Supreme Court, U.S.
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No. 06-

In The

Supreme Court of the United States

OCTOBER TERM 2006

—♦—

BOARD OF EDUCATION OF THE HYDE PARK CENTRAL SCHOOL DISTRICT,

Petitioner,

-against-

FRANK G. and DIANNE G. Parents of a Disabled Student, ANTHONY G.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

JAMES P. DROHAN
DONOGHUE, THOMAS, AUSLANDER & DROHAN, LLP
Attorneys for Petitioner
2517 Route 52
Hopewell Junction, New York 12533
(845) 227-3000

—♦—

SW
St. Louis West, Inc. (3685)
NY (212) 684-3117 NJ (201) 863-8133
Printed on Recycled Paper

QUESTION PRESENTED FOR REVIEW

DOES THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT PERMIT AN AWARD OF TUITION REIMBURSEMENT WHERE A STUDENT HAS NOT PREVIOUSLY RECEIVED SPECIAL EDUCATION AND RELATED SERVICES UNDER THE AUTHORITY OF A PUBLIC AGENCY?

PARTIES TO THE PROCEEDING

Petitioner is the Board of Education of the Hyde Park (New York) Central School District.

Respondents are residents of the School District, and parents of a student classified with a disability under the Individuals With Disabilities Education Act ("IDEA") (20 U.S.C. 1400 et seq).

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RELEVANT STATUTORY LANGUAGE

(ii) Reimbursement for Private School Placement. If the parents of a child with a disability, who previously received special education and related services under the authority of a public agency, enroll the child in a private elementary or secondary school without the consent of or referral by the public agency, a court or hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available in a timely manner prior to that enrollment.

20 U.S.C. 1412 (a)(10)(C)(ii)(emphasis supplied)

BASIS FOR THIS COURT'S JURISDICTION

(I) The Decision Order, and Judgment of the Second Circuit were entered on July 27, 2006.

(ii) No petition for rehearing was filed in this case.

(iii) The statutory provision believed to confer jurisdiction on the Court is 20 U.S.C. §1412(b)(2).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS RELIED UPON

- The relevant section of the IDEA statute is 20 U.S.C. § 1412(a)(10)(C)(ii)
- The relevant implementing regulation is 34 C.F.R. § 300.403(C)

STATEMENT OF THE CASE

Respondents filed an action in the Southern District of New York under the IDEA, seeking to overturn local and state administrative determinations that they were not entitled to tuition reimbursement for the costs of their son's attendance at a private school for the 2001-2002 school year.

After conducting a brief bench trial, the District Court reversed the administrative determinations; found that the private school selected by the parents was appropriate under IDEA; and awarded tuition reimbursement to the parents.

On appeal, the Second Circuit affirmed the District Court's finding that the private school was appropriate. It also found that respondents' tuition reimbursement claim was not barred by 20 U.S.C. § 1412(a)(10)(C)(ii), which provides for reimbursement of tuition where the student has:

> ...previously received special education and related services under the authority of a public agency.

ARGUMENT

POINT I

THE 1997 AMENDMENTS TO THE INDIVIDUALS WITH DISABILITIES EDUCATION ACT PRECLUDE AN AWARD OF TUITION REIMBURSEMENT WHERE, AS HERE, THE STUDENT HAS NOT PREVIOUSLY RECEIVED SPECIAL EDUCATION AND RELATED SERVICES UNDER THE AUTHORITY OF A PUBLIC AGENCY

PRELIMINARY STATEMENT

Petitioner's position is that the federal statute governing classification and placement of students with disabilities clearly and unambiguously precludes tuition reimbursement for students unilaterally enrolled by their parents in private schools, where the parents have not first tried any public school special education placement.

Since the decision of the Second Circuit is both to the contrary and inconsistent with relevant decisions of other federal courts and this Court, we respectfully request this Court grant the Petition for a Writ of Certiorari.

A. Summary of Petitioner's Position

Petitioner urges this Court to grant certiorari for the

following reasons:

i. The IDEA statute clearly limits the availability of tuition reimbursement to situations where a student had previously received special education from a public agency. The relevant legislative history also confirms this interpretation was, indeed, the intent of Congress;

ii. The Second Circuit's decision is in conflict with a First Circuit decision (as well as a number of lower court decisions) addressing the same issue;

iii. The decision below is contrary to this Court's recent decision in Arlington v. Murphy, in two significant aspects:

a) it fails to analyze the statutory language from the viewpoint of a state official charged with deciding whether to accept federal guidelines in return for federal funds under IDEA, as required under the Spending Clause.

b) it impermissibly relies (to justify its interpretation of the statute) upon the overarching goal of IDEA to provide, a free, appropriate public education "....at the expense of all other considerations including, fiscal considerations"[1]

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[1] Arlington v. Murphy, ____ U.S. _____; 126 S. Ct. 2455, 2463 (2006).

iv. The opinion below is also contrary to this Court's holding in Schaffer v. Weast, as

a) it relies upon a presumption that a school district's IEP will necessarily be flawed (and even harmful) contrary to Court's holding in Schaffer that IDEA does not allow ". . .the Court to assume every IEP is invalid until the school district demonstrates it is not, and that ". . .IDEA relies heavily upon the expertise of school districts to meet its goals."[2]

b) the Court below failed to acknowledge, in its analysis of the "broad context" of the statute, that Congress has expressed its concern over litigation- related costs under IDEA[3].

v. The Court below erroneously found that for the statute to require a parent first try the public school's proposal of special education placement prior to a private parental placement seeking tuition reimbursement works an "absurd result".

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[2]Schaffer v. Weast, 546 U.S. 49, 126 S.Ct. 528, 536 (2005)

[3]Id.

B. The 1997 Amendments to IDEA Which Restricted the Availability of Tuition Reimbursement

Since 1985, this Court has recognized that where an appropriate public education has not been provided to a student with a disability, the parents may place the student in a private school and seek reimbursement from the public school district of residence for the cost of tuition. School Comm. of Burlington v. Dept. of Ed., 471 U.S. 359, 369-370 (1985); see also, Florence County Sch. Dist. Four v. Carter, 510 U.S. 7, 9-10 (1993).

However, as this Court has also noted, IDEA has been amended by Congress since the Burlington decision on several occasions, including in 1997:

> ...in order to reduce its administrative and litigation-related costs. For example, in 1997 Congress mandated that States offer mediation for IDEA disputes.

Schaffer v. Weast, 546 U.S.49,57; 126 S.Ct. 528, 535 (2005).

The 1997 amendments to IDEA also "...clarify the circumstances under which parents are entitled to receive reimbursement for private school tuition." Lunn v. Weast, 2006 WL 1554895*5 (D. Md. 2006).

In its 1997 amendments to IDEA, Congress both

clarified the circumstances under which tuition reimbursement was available, and restricted the availability of such a remedy, by adding language providing that tuition reimbursement for a unilateral parental placement is available where the student:

> ...previously received special education and related services under the authority of a public agency.

20 U.S.C. § 1412(a)(10)(C)(ii)

This language was also added to the applicable implementing regulations for IDEA, at the same time 34 C.F.R. § 300.403(C).

The pertinent legislative history available for that revision of IDEA confirms that it was the intent of Congress that previous receipt of public special education is a prerequisite to an award of tuition reimbursement:

> ...Section [1412(a)(10)(C)(ii)] also specifies that parents may be reimbursed for the cost of a private educational placement under certain conditions (i.e., when a due process hearing officer or judge determines that a public agency had not made a free, appropriate public education available to the child, in a timely manner, prior to the parents enrolling the child in that placement without the public agency's consent). Previously, the child must have

> received special education and related services under the authority of a public agency.

H.R. Rep. No. 105-95, at 90 (emphasis supplied).

The statute is clear on its face, then, as to the unavailability of tuition reimbursement where the student has previously not received special education and related services under the authority of a public agency.

C. The Second Circuit's Holding that 20 U.S.C. § 1412(a)(10)(C)(ii) Does Not Preclude Tuition Reimbursement Where the Student has not Previously Received Special Education and Related Services from a Public Agency

In rejecting the School District's argument that 20 U.S.C. § 1412(a)(10)(C)(ii) precluded tuition reimbursement, the Second Circuit reasoned:

(i) that (having concluded the statutory language was ambiguous) reference to the "traditional canons of statutory construction" dictated a finding the statute does not preclude tuition reimbursement, since:

(a) an award of tuition reimbursement under such circumstances would be consistent with the "broader context" and "primary purpose" of the statute. 459 F.3d, at 371;

(b) the meaning of the purportedly ambiguous language at issue is clarified by the

remainder of the statutory scheme, the purpose of which is to confer "...broad discretion on the district court to grant relief it deems appropriate to parents of disabled children who opt for a unilateral private placement in cases where the parents' placement is determined to be proper and the proposed IEP is determined to be inadequate." Id.;

(c) ambiguous statutes must be construed to avoid "absurd results," and (so the Second Circuit reasoned) just such a result would be occasioned were the statute to be construed to require "...a wasted year of actual failure," which would "...jeopardize (the) child's health and education in this manner in order to qualify for the right to seek tuition reimbursement." 459 F.3d, at 372.

(ii) its own interpretation was consistent with that contained in an informal letter issued by the United States Department of Education's Office of Special Education and Rehabilitative Services ("OSERS") (even though it noted that the degree of deference owed to an agency's informal letter "remains unclear"). Id., at 372-373;[4]

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[4]The informal letter was actually issued by the United States Department of Education's Office of Special Education Programs ("OSEP"). Letter to Luger 33 IDELR 126 (OSEP 1999).

(iii) it dismissed the language in the House Report stating a child "must" have "previously received" special education and related services from a public agency in order to qualify for tuition reimbursement, as nothing more than "...an awkward paraphrase of the ambiguous statutory language." Id., at 373.

(iv) It went on to reason that "...a thoughtful member of Congress" would "...very likely have concluded" in the 1997 amendments the word "previously" referred to the fact that "...prior to the proposed amendment to the IDEA, parents could receive reimbursement for a private placement only if the child received special education and related services from a public agency." This was not the law, however, prior to 1997.

(v) the Court expressly disagreed with the First Circuit's holding in Greenland School Dist. v. Amy N., 358 F.3d 150 (1st Cir. 2004) that a student's receipt of special education services from the public school system is a "threshold requirement" to "receiving private school tuition".

In its decision, however, the Second Circuit:

- nowhere mentioned this Court's finding in Schaffer that the 1997 Amendments to IDEA were enacted, in part, to address rising administrative and litigation costs [Schaffer is not cited at all in the Second Circuit's decision];

- nowhere relies on this Court's analysis in Arlington School Dist. v. Murphy, 126 S.Ct. 2455, requiring that disputes involving the statutory language of IDEA be

reviewed, pursuant to the Spending Clause, from the perspective of a state official engaged in the process of deciding whether the state should accept IDEA funds, along with the obligations accompanying these funds.

D. Legal Errors in the Second Circuit's Decision Warranting this Court's Review

The Second Circuit's reasoning is, we submit, both legally erroneous and in conflict with decisions in other circuits. It is also in conflict with recent prior decisions of this Court regarding special education and statutory construction, since:

1. The statutory language is clear on its face. The Second Circuit's reading of the statute that the word "previously" is simply a reference to the status of the law as it existed prior to the 1997 statutory amendments is irrational and illogical. Prior to 1997, it clearly was not the law students must have received special education and related services prior to unilateral enrollment in a private school. See e.g., Doe v. Metropolitan Nashville Public Schools, 133 F.3d 384 (6th Cir. 1998). The Second Circuit's opinion provides no legal support for this conclusion, and none exists.

2. To the extent legislative history is relevant, the House Report reaffirms that the statute requires that the student must have received special education and related services from the public school prior to

unilateral private school placement in order to be eligible for tuition reimbursement.

3. Reviewing the "broader context"of the statute[5] alluded to by the Second Circuit:

   a) its decision completely ignores the fact that one primary purpose of the 1997 amendments was to reduce IDEA's "administrative and litigation costs," a fact this Court adverted to in its 2005 decision in Schaffer which clarified that parents have the burden of proof in IDEA due process proceedings; and

   b) the Second Circuit's reliance on the finding that ". . .the express purpose of the IDEA is to ensure that a free public education is "available to all children" with disabilities is contrary to this Court's holding in Arlington v. Murphy. In Arlington, this Court specifically rejected this analysis, holding, that the broad, general goal of IDEA does not trump all other considerations, including fiscal considerations:

      ". . .(R)espondents argue that their interpretation of the IDEA furthers the Act's overreaching goal of "ensuring" that all children with disabilities have available to them a free appropriate public education. . .as well as

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[5]Petitioners submit, of course, that the statute is unambiguous, and it was, therefore unnecessary for the Court to examine the "broader context" of the statute.

> the goal of "safeguard(ing) the rights of parents to challenge school decisions that adversely affect their child. . .these goals, however, are too general to provide support for respondents' reading of the terms of the IDEA. The IDEA obviously does not seek to promote these goals at the expense of all other considerations, including fiscal considerations". Arlington v. Murphy _____U.S._____ , 126 S.Ct. 2455, 2463 (emphasis supplied).

4. The "absurd result" suggested by the Second Circuit of a "...wasted year of actual failure" (in an inappropriate public placement, which would, assertedly, be occasioned by the school district's interpretation of the statute) is unsupported by any analysis of the statutory scheme.

First, there is no statutory requirement the student must have been enrolled for a minimum period of either a year, a month, or even a week in the school district's proposed placement prior to a unilateral private parental placement.

Second the statutory requirement is, very simply, that the parent – for however brief a period of time first give the public school's placement a try.

This can hardly be characterized as an absurd requirement, and it is, certainly no more absurd than the Second Circuit's own reading, under which a parent could

obtain tuition reimbursement without ever once sampling the public placement.[6] The Second Circuit's reading of the statute is certainly inconsistent with this Court's teaching, in Schaffer, that an IEP is not presumed invalid until the school district demonstrates otherwise:

> ...Petitioners in effect ask this Court to assume that every IEP is invalid until the school district demonstrates that it is not. The Act does not support this conclusion.

Schaffer, supra, at 126 S.Ct. 528, 535-536 (emphasis supplied).

The Second Circuit's holding, in effect, adopts the failing argument in Schaffer, and attempts to justify its interpretation of the previously. . .received language by an overarching assumption that the District's IEP will not only be inappropriate – but one which, in fact, "...will jeopardize (the) child's health and education." 459 F.3d, at 372.

The School District's interpretation of the statute is,

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[6]See e.g.., T.H. ex rel A.H. v. Clinton Township Board of Education, 2006 WL 1722600 (D.N.J. 2006), in which the district court adopted the view that the statutory provision at issue "...ensures that a parent's rejection of a public school placement is not based on mere speculation as to whether the recommended public school placement would have been appropriate."

on the other hand, consistent with other procedural requirements of IDEA which also deter, or prevent, parents from making a unilateral private placement leading to tuition reimbursement, including the fact that: (a) written notification of dissatisfaction with the District's placement must be provided prior to the parent placement.[20 U.S.C. 1412(a)(10)(C)(iii)(I); (b) the fact that tuition reimbursement may be denied or reduced if the parent did not make the child available for an evaluation by the public school district 34 CFR 300.403(d)(2); and (c) the fact that a due process hearing cannot even occur prior to the convening of a "resolution session," where the parents and district are obliged to attempt to resolve the matter. [20 U.S.C. 1415(f)(1)(b)].

The Second Circuit's holding is also inconsistent with this Court's holding in Burlington that:

> ...parents who unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk.

Burlington, 471 U.S. at 374-375.

The Court below appeared to misconstrue both the statutory scheme and this Court's IDEA jurisprudence, and imposed a requirement that parents who make unilateral

private placement decisions should encounter no financial risk by virtue of such a decision.

5. As there exists no ambiguity in the statutory language, any deference to the informal letter from OSEP was inappropriate. see, e.g., Chevron U.S.A., Inc. v. National Resources Defense Council, Inc., 467 U.S. 837, 842-844 (1984); Christensen v. Harris County, 529 U.S. 576, 586-587 (2000).

E. The Circuit Courts Are Split on the Issue

As the Second Circuit acknowledges, it disagrees with the First Circuit's analysis of the statute at issue set forth in the latter court's decision in Greenland Sch. Dist. v. Amy N., 358 F.3d 150 (1st Cir. 2004). see Frank G.459 F.3d, at 375.[7]

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[7]Shortly after issuing its opinion in Frank G., the Second Circuit issued a summary order reversing another district court decision which had dismissed an IDEA complaint seeking tuition reimbursement on the grounds that the student had not previously received special education and related services from a public agency. Board of Educ. of the City School Dist. of City of New York v. Amy F., 2005 WL 22866(S.D.N.Y. 2005); rev'd., Board of Education of City School Dist. of City of New York v. Tom F. ex rel Gilbert F., ___ F.3d ___, ___ 2006 WL 2335239 C.A.2 (N.Y.) 2006. The District Court decision in Tom F. had found that the First Circuit's position was that tuition reimbursement was precluded where the student had not previously received special education and related services from a public agency: "...(T)he [illegible]t of Appeals for the First Circuit reached this conclusion in [illegible]nd School Dist., 358 F.3d 150, 158-160 (2004)".

The Eleventh Circuit would appear to be in agreement with the Second Circuit on this issue. See, M.M. ex rel C.M. v. Sch. Board of Miami-Dade County, 437 F.3d 1085, 1098-99 (11th Circ. 2006).

However, District Courts in both the Fourth and Third Circuits have recently issued opinions in accord with Petitioner's interpretation of the statute at issue. Lunn v. Weast,[8] 2006 WL 15544895 (D. Md. 2006) and Baltimore City Board of School Commissioners v. Taylorch, 395 F. Supp. 2d 246 (D. Md. 2005); see also, T.H. and K.H. o/b/o A.H. v. Clinton Twp. Bd. of Ed., 2006 WL 1128713 (D. N.J. 2006).

F. The Second Circuit's Ruling Is Inconsistent with Prior Decisions of this Court

The Second Circuit's decision is also inconsistent with this Court's recent decision in Arlington, supra, requiring that a statutory review of the IDEA should proceed under a Spending Clause analysis, as viewed from the perspective of a State official applying for receipt of IDEA funds. As is also set forth above, the Second Circuit's decision is inconsistent

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[8]Lunn is currently on appeal to the Fourth Circuit, (Docket No. 06-1945).

with this Court's holding in Schaffer that an IEP is not presumed inappropriate until the school district demonstrates otherwise.

The Second Circuit's opinion also conflicts with this Court's prior holdings regarding interpretations of federal statute. The Second Circuit nowhere discusses this Court's teaching, in Connecticut National Bank v. Germain, 503 U.S. 249 (1992), that:

> ...courts must presume that a legislature says in a statute what it means and means in a statute what it says there.

Id., at 253. The Second Circuit disregarded this ruling, as it looked beyond the clear language of the statute requiring that a child must have previously received special education and related services from a public agency in order to qualify for tuition reimbursement.

The decision below also appears to disregard the maxim of statutory construction requiring the Court to "...disfavor interpretations of statutes that render language superfluous." Germain, at 503 U.S., at 253.

Under the Second Circuit interpretation, the "...previously received special education" language in IDEA 1997 becomes mere surplusage, a result disfavored under the

canons of statutory construction.

Petitioner submits the Court below decided an important question of federal law that has not been, but should be, decided by this Court. Also, we respectfully submit, that the Court also decide this important federal question in a way that does not conflict with relevant decisions of this Court, as set forth above. As the decisions cited above indicate, this is an issue with which federal courts throughout the country are current grappling with differing results. The interpretation of this 1997 amendment is an important issue, concerning which this Court's intervention and guidance would be warranted.

It is, accordingly, requested that this Court grant the petition for a writ of certiorari on the question presented.

CONCLUSION

CERTIORARI SHOULD BE GRANTED ON THE QUESTION PRESENTED TO THIS COURT.

Dated: Hopewell Junction, NY
October 20, 2006

Respectfully submitted,

DONOGHUE, THOMAS,
AUSLANDER & DROHAN, LLP

By: James P. Drohan

James P. Drohan
A Member of the Firm
2517 Route 52
Hopewell Junction, NY 12533
Tel.: (845) 227-3000
FAX: (845) 227-6873

Of Counsel:

Daniel Petigrow

File
Oct 23 2006

No. 06-580

In The

Supreme Court of the United States

OCTOBER TERM 2006

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BOARD OF EDUCATION OF THE HYDE PARK CENTRAL SCHOOL DISTRICT,

Petitioner,

-against-

FRANK G. and DIANNE G. Parents of a Disabled Student, ANTHONY G.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

APPENDIX

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St. Louis West, Inc. (3685)

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Appendix A – Judgment of the United States Court of Appeals for the Second Circuit, Filed July 27, 2006 [Pages 1a – 2a]

United States Court of Appeals

FOR THE
SECOND CIRCUIT

JUDGMENT

At a stated Term of the United States Court of Appeals for the Second Circuit, Held at the Thurgood Marshall United States Courthouse, Foley Square, in the City of New York, on the 27th day of July, two thousand and six.

Before: Hon. Rosemary S. Pooler,
Hon. Sonia Sotomayor,
Circuit Judges,
Hon. Edward R. Korman,
District Judge.[*]

Docket No. 04-4981-cv

FRANK G. AND DIANNE G., Parents of a Disabled Student ANTHONY G.,

Plaintiffs-Appellees,

v.

BOARD OF EDUCATION OF HYDE PARK, CENTRAL SCHOOL DISTRICT,

Defendant-Appellant.

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[*] The Honorable Edward R. Korman, Chief Judge of the United States District for the Eastern District of New York, sitting by designation.

Issued as Mandate: August 22, 2006

Appendix A
[Judgment of the USCA for the Second Circuit]

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York and was argued by counsel.

On consideration whereof, it is hereby ORDERED, ADJUDGED and DECREED that the judgment of said District Court be and it hereby AFFIRMED in accordance with the opinion of this Court.

FOR THE COURT:
ROSEANN B. MACKECHNIE,
Clerk
by

_____
Tracy W. Young
Motions Staff Attorney

Appendix B - Decision of the United States Court of Appeals for the Second Circuit, Decided July 27, 2006 [Pages 3a – 55a]

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term, 2004

(Argued: August 3, 2005 Decided: July 27, 2006)

Docket No. 04-4981 -cv

FRANK G. and DIANNE G., Parents of a Disabled Student, ANTHONY G.,

Plaintiffs-Appellees,

v.

BOARD OF EDUCATION OF HYDE PARK, CENTRAL SCHOOL DISTRICT,

Defendant-Appellant.

Before: POOLER, SOTOMAYOR, Circuit Judges, and KORMAN, District Judge *

Appeal from a judgment of the United States District Court for the Southern District of New York (Charles L. Brieant, *Judge*), ordering defendants to reimburse plaintiffs for tuition and attorney fees.

Appendix B
[Decision of the USCA for the Second Circuit]

Plaintiffs sought reimbursement from defendant Board of Education of Hyde Park Central School District for private school tuition after defendant failed to offer plaintiff's child a free appropriate public education as defined under the Individuals with Disabilities Education Act.

Affirmed.

MARK I. REISMAN, P.C., Ossining, New York, for *plaintiffs-appellees*

JAMES P. DROHAN, Donoghue, Thomas, Auslander & Drohan, (DANIEL PETIGROW, *on the brief*), Hopewell Junction, New York, *for defendant-appellant*

KORMAN, District Judge:

This appeal arises out of the efforts of the parents of a learning disabled child to obtain reimbursement for the private school tuition they incurred as a result of the failure of

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* The Honorable Edward R. Korman, Chief Judge of the United States District Court for the Eastern District of New York, sitting by designation.

a local educational agency to provide him with a free appropriate public education. Specifically, defendant-appellant Board of Education of Hyde Park Central School District ("School District") appeals from a judgment of the United States District Court for the Southern District of New York (Brieant, J.) finding that the School District had failed to provide the learning disabled child of plaintiff-appellees Frank and Dianne G. a free appropriate public education as defined under the Individuals with Disabilities Act ("IDEA"), 20 U.S.C. § 1400 et seq. The School District argues that the district court erred in awarding plaintiff's reimbursement for tuition and attorneys' fees because, under the IDEA, Anthony's enrollment in private school was not appropriate and because the IDEA, 20 U.S.C. § 1412(a)(10)(C), permits reimbursement only where a child has previously received special education and related services. For the reasons stated below, we disagree with the School District's arguments and affirm the decision of the district court.

FACTUAL BACKGROUND

Frank and Diane G. are the adoptive parents of Anthony, who was born to a crack-addicted mother on May

21, 1991. Since the age of three, Anthony has been diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD"). During the 1997-98 school year, Anthony attended kindergarten at the Randolph School, a private school in Wappingers Falls, New York. From 1997 to 2001, Anthony completed first through fourth grade at Bishop Dunn School, a private school in Newburgh, New York. While Anthony did well at Bishop Dunn initially, as he progressed from first through fourth grade, his performance worsened in relation to the increasingly challenging academic environment and bigger class sizes he faced. In April 2000, in response to notification from Anthony's parents, the Committee on Special Education ("CSE") of the School District classified Anthony as learning disabled under the IDEA, Article 89 of the New York Education Law, and Part 200 of Title 8 of the Regulations of the Commissioner of Education.

During the spring of 2001, Anthony was evaluated by School District personnel. An occupational therapy evaluation conducted on February 1, 2001, revealed deficits in visual memory and visual sequential memory skills. The evaluator recommended that Anthony receive group occupational therapy twice a week. A Key Math Assessment administered

on March 9, 2001, revealed severe deficiencies in subtraction and problem solving, and below average skills in rational numbers and in areas involving multi-step applications. During an in- class behavioral assessment, Anthony was observed engaging in a significant amount of off-task behavior.

An independent neuropsychological evaluation was conducted during the spring and early summer of 2001 by Dr. Miriam Lacher. She administered a standardized individual achievement test to Anthony, during which she observed him engaging in negative self-evaluations and experiencing difficulty formulating responses, shifting tasks, absorbing directions, and taking into account the important aspects of situations. Among her detailed recommendations, Dr. Lacher recommended that Anthony receive " individualized attention and a relatively small class," concluding that "[s]ince his current class size appears too large, consider dropping [him] down to a class of 12, with an aide to assist." Dr. Lacher also noted that Anthony's social skills would be most effectively addressed in a group setting, that his teacher should "[k]eep directions brief and simple," that he would "do best in 'old fashioned' home and school settings that stress values around

control and provide routine, structure, discipline, and consistency as well as warmth." She also recommended, *inter alia*, that Anthony receive occupational therapy, social skills training in a group setting, and continued counseling.

On August 8, 2001, the CSE reviewed Anthony's performance from the previous year and developed an independent education plan ("IEP") for the 2001-02 school year. The CSE recommended placement in a regular education class of 26 to 30 students at the Ralph R. Smith Elementary School ("Smith School"), a public school within the School District, as well as direct consultant teacher services for math and organizational skills, a full- time individual aide, and related services of counseling, group occupational therapy, a behavior modification program, and testing modifications. The CSE also observed that Anthony was dually enrolled at Bishop Dunn for the 2001-2002 school year.

On August 10, 2001, Diane G. wrote to the School District and requested an impartial hearing to reconsider the CSE's recommendation that Anthony receive special education services at the Smith School and asked that the CSE instead provide these services at Bishop Dunn. She

emphasized that the Smith School's class size of 25 students or more would not be appropriate for Anthony, a position consistent with recommendations provided by Anthony's teachers and therapists. This letter had the effect of initiating a hearing before an Impartial Hearing Office ("IHO"), which took place over the course of four days between November 1 and December 13, 2001. In the meantime, Anthony's parents enrolled him at the Upton Lake Christian School ("Upton Lake"), a parochial school in Clinton Corners, New York, instead of Bishop Dunn. At Upton Lake, Anthony repeated fourth grade in a regular education class of 14 students.

The School District's initial position before the IHO was that Anthony's placement at the Smith School was appropriate and that the unilateral placement at Upton Lake was not appropriate. After one of its own witnesses testified that the class size and program it offered to Anthony was not appropriate, the School District conceded that the placement offered to Anthony at the Smith School was not appropriate. This left the School District with the defense that the Upton Lake placement was equally inappropriate and that it was not required to bear the expense of educating him there.

Appendix B
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On February 22, 2002, the IHO accepted the concession of the School District that it "has failed to offer A[nthony] a free and appropriate public education." The IHO also agreed with Anthony's parents that he "needs a small structured classroom setting with an aid to assist him." Nevertheless, the IHO agreed with the School District that Upton Lake was not an appropriate placement for Anthony and concluded that the School District was not required to reimburse plaintiffs for his tuition. Specifically, the IHO found that the placement of Anthony at Upton Lake was inappropriate because he was not making academic or social progress there. This conclusion was based on the fact that Anthony was in attentive in class, he received "needs improvement" in English, bible, history, and science; "needs improvement" in behavior; and unsatisfactory grades in reading and math on his Five Week Progress Report. In addition, Anthony's first grading period report card demonstrated that Anthony needed improvement in math, language arts, penmanship, spiritual growth, social growth, and independent work, and that he received unsatisfactory grades in reading worksheet activities, applying spelling skills to writing, and work and study habits. Nevertheless, the IHO

ordered the School District to provide consultant teacher services, counseling, occupational therapy, and a one-to-one aide to Anthony at Upton Lake. The IHO's decision was based on evidence received through December 13, 2001.

Both parties filed an administrative appeal of the IHO's ruling to the State Review Officer ("SRO"). On the appeal, the School District "conceded that the regular education class placement recommended by its CSE did not appropriately address the student's needs" and it did "not challenge . . . the hearing officer's finding that it failed to offer" Anthony a free appropriate public education. On March 20, 2003, the SRO affirmed both the IHO's order denying tuition reimbursement and the order requiring the School District to provide Anthony a direct consultant teacher and a one-to-one aide at Upton Lake. In concluding that Upton Lake was inappropriate, the SRO emphasized that Anthony's academic performance during the first and second quarters of 2001-2002 continued to be poor and that, while Upton Lake "appeared to address some of [Anthony's] organizational and social needs, it did not adequately address his deficits in math, written expression, and handwriting." Moreover, he also observed that Upton Lake provided Anthony "with

accommodations, not specialized instruction in his main areas of need." The SRO did not consider evidence of Anthony's performance at Upton Lake during the third and fourth quarters of the 2001- 02 academic year.

On July 18, 2003, plaintiffs filed a complaint in the Southern District of New York seeking tuition reimbursement for the 2001-02 school year. After a bench trial, Judge Brieant held that, in light of the additional evidence adduced at trial, Upton Lake was an appropriate placement for Anthony. Although mindful that a district court should defer to an SRO's educational experience, Judge Brieant emphasized that his decision was " not based solely on the evidence before the SRO," but was informed by additional evidence of Anthony's progress, including testimony of Anthony's social and behavioral development, his Stanford Achievement Test results, and his year-end grades. Anthony's teacher testified that during the second half of the year at Upton Lake, Anthony had "continued to make steady progress. He gained in emotional stability. He gained in the ability to work independently. He improved his grades tremendously." Moreover, the record before the SRO did not contain evidence of Anthony's" phenomenal" results from the

Stanford Achievement Test, including evidence that Anthony completed the test without any special accommodations, and that he had scored below average in only two subcategories under math procedure and one subcategory under reading comprehension, while scoring average or above average in every other category and subcategory, including reading vocabulary, reading comprehension, mathematics problem-solving, mathematics procedure, language, spelling, study skills, science, social science, listening, using information and thinking skills. Finally, the SRO did not have the benefit of Anthony's grades from the final two marking periods. As noted by Judge Brieant (and reflected in Anthony's final report card), Anthony's grades "increased in every subject with the exception of spelling from the first to the fourth marking period. Most notably, his grade in math increased from a 63 to a 91 and his reading grade increased from a 67 to a 91."

While Judge Brieant acknowledged that Upton Lake had neither provided Anthony with an individual aide nor with direct consultant teacher services, he was satisfied that Anthony's teacher, Ms. Linda Fredericks, had worked with Anthony individually when possible, and that "she also made

certain testing and other academic modifications for Anthony to assist him in successfully completing his assignments." He also noted that, as Anthony progressed over the course of the year, the need for individual attention lessened. Concluding that the facts from the administrative record and the trial demonstrated that "Anthony made meaningful academic and social progress and received educational benefit," Judge Brieant awarded tuition reimbursement to plaintiff-appellees in the amount of $3,660.00. He noted that, while the SRO had not addressed whether equitable considerations would prohibit an award of tuition reimbursement, there was no evidence on the record to disturb the IHO's finding "that the equities favored tuition reimbursement" if on appeal it is found that the parent's placement is appropriate. Judge Brieant also awarded attorneys' fees in the amount of $34,567.00, or $10,903.13 less than the total amount requested by the parents, while expressing concern over the total expenses of the litigation in light of the relatively small tuition sum sought and awarded.

The School District appeals from the judgment entered by Judge Brieant. It argues that the private school education for which reimbursement was sought was not an appropriate

placement, that the district court failed to accord appropriate deference to the administrative findings, that equitable circumstances do not warrant an award and that the district court abused its discretion both in considering additional evidence and in determining the attorney fee award. The School District also argues that the 1997 amendments to the IDEA, 20 U.S.C. § 1400 et seq., established a threshold requirement that a disabled child must have previously received public special education and related services in order to be eligible for reimbursement and that plaintiffs have failed to satisfy that requirement.

DISCUSSION

Congress enacted the IDEA to promote the education of children with disabilities, "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs [and] . . . to ensure that the rights of children with disabilities and parents of such children are protected." 20 U.S.C. § 1400(d)(1); see Sch. Comm. of Burlington v. Dep't of Educ., 471 U.S. 359, 367 (1985). A free appropriate public education "must include

'special education and related services' tailored to meet the unique needs of a particular child, and be 'reasonably calculated to enable the child to receive educational benefits.'" Walczak v. Florida Union Free Sch. Dist., 142 F.3d 119, 122 (2d Cir. 1998) (quoting Bd. of Educ. v. Rowley, 458 U.S. 176, 207 (1982)) (internal citation omitted).

The key element of the IDEA is the development of an IEP for each handicapped child, which includes "a comprehensive statement of the educational needs of a handicapped child and the specially designed instruction and related services to be employed to meet those needs." Burlington, 471 U.S. at 368. The IEP is collaboratively developed by the parents of the child, educators, and other specialists. 20 U.S.C. § 1414(d)(1)(B); Honig v. Doe, 484 U.S. 305, 311 (1988). New York has set forth regulations to implement the goals of the IDEA, which "appear to track the IDEA closely." Bd. of Educ. v. O'Shea, 353 F. Supp. 2d 449, 454 (S.D.N.Y. 2005); see N.Y. Comp. Codes R. & Regs. tit. 8, § 200.1 et seq. " 'In developing a particular child's IEP, a [Committee on Special Education] is required to consider four factors: (1) academic achievement and learning characteristics, (2) social development, (3) physical

development, and (4) managerial or behavioral needs." Walczak, 142 F.3d at 123 (citing N.Y. Comp. Codes R. & Regs. tit. 8 § 200.1(kk)(2)(i) (1997)).

If a state fails in its obligation to provide a free appropriate public education to a handicapped child, the parents may enroll the child in a private school and seek retroactive reimbursement for the cost of the private school from the state. Burlington, 471 U.S. at 370; M.S. ex rel. S.S. v. Bd. of Educ., 231 F.3d 96, 102 (2d Cir. 2000). In determining whether parents are entitled to reimbursement, the Supreme Court has established a two pronged test: (1) was the IEP proposed by the school district inappropriate; (2) was the private placement appropriate to the child's needs. See Burlington, 471 U.S. at 370; see also Florence County Sch. Dist. Four v. Carter ex rel. Carter, 510 U.S. 7, 12-13 (1993). Moreover, because the authority to grant reimbursement is discretionary, "equitable considerations [relating to the reasonableness of the action taken by the parents] are relevant in fashioning relief." Burlington, 471 U.S. at 374; M.C. ex rel. Mrs. C. v. Voluntown Bd of Educ., 226 F.3d 60, 68 (2d Cir. 2000); 20 U.S.C. § 1412(a)(10)(C)(iii)(III).

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Parents seeking reimbursement for a private placement bear the burden of demonstrating that the private placement is appropriate, even if the proposal in the IEP is inappropriate. M.S., 231 F.3d at 104. Nevertheless, parents are not barred from reimbursement where a private school they choose does not meet the IDEA definition of a free appropriate public education. See 20 U.S.C. § 1401(9). An appropriate private placement need not meet state education standards or requirements. Carter, 510 U.S. at 14. For example, a private placement need not provide certified special education teachers or an IEP for the disabled student. Id. In addition, parents "may not be subject to the same mainstreaming requirements as a school board." M.S., 231 F.3d at 105 (citing Warren G. v. Cumberland County Sch. Dist., 190 F.3d 80, 84 (3d Cir. 1999) (holding that "the test for the parents' private placement is that it is appropriate, and not that it is perfect")).

Subject to the foregoing exceptions, the same considerations and criteria that apply in determining whether the School District's placement is appropriate should be considered in determining the appropriateness of the parents' placement. Ultimately, the issue turns on whether a placement

- public or private - is "reasonably calculated to enable the child to receive educational benefits." Bd. of Educ. v. Rowley, 458 U.S. 176, 207 (1982); Muller ex rel. Muller v. Comm. on Special Educ., 145 F.3d 95,105 (2d Cir. 1998). While the IDEA does not require states to "maximize the potential of handicapped children," Rowley, 458 U.S. at 213, it must provide such children with "meaningful access" to education, Walczak, 142 F.3d at 133. With these goals in mind, we have held that for an IEP to be reasonably calculated to enable a child to receive an educational benefit, it must be "likely to produce progress, not regression." Id. at 130 (quoting Cypress-Fairbanks Indep. Sch. Dist. v. Michael F., 118 F.3d 245, 248 (5th Cir. 1997)). Courts must, therefore, "examine the record for any 'objective evidence' indicating whether the child was likely to make progress or regress under the proposed plan." Id. (quoting Mrs. B. v. Milford Bd. of Educ., 103 F.3d 1114, 1121 (2d Cir. 1997)). Thus, "in the regular classrooms of a public school system, the achievement of passing marks and regular advancement from grade to grade will be one important factor in determining educational benefit." Rowley, 458 U.S. at 207 n.28; see also Sherman v. Mamaroneck Union Free Sch. Dist., 340 F.3d 87, 93 (2d Cir.

2003) (noting that "[p]assign grades are . . . often indicative of educational benefit"). Although it is more difficult to assess the significance of grades and regular advancement outside the context of regular public classrooms, these factors can still be helpful in determining the appropriateness of an alternative educational placement. See Walczak, 142 F.3d at 130.

No one factor is necessarily dispositive in determining whether parents' unilateral placement is "reasonably calculated to enable the child to receive educational benefits." Rowley, 458 U.S. at 207. Grades, test scores, and regular advancement may constitute evidence that a child is receiving educational benefit, but courts assessing the propriety of a unilateral placement consider the totality of the circumstances in determining whether that placement reasonably serves a child's individual needs. See Knable ex rel. Knable v. Bexley City Sch. Dist., 238 F.3d 755, 778 (6th Cir. 2001) (holding that a unilateral private placement was appropriate where, *inter alia*, class sizes were small, the student made significant educational progress, and his grades and behavior improved significantly). To qualify for reimbursement under the IDEA, parents need not show that a private placement furnishes

every special service necessary to maximize their child's potential. See M.S., 231 F.3d at 105 ("The test for parents' private placement is not perfection.") (internal quotation marks omitted). They need only demonstrate that the placement provides "educational instruction specially designed to meet the unique needs of a handicapped child, supported by such services as are necessary to permit the child to benefit from instruction." Rowley, 458 U.S. at188-89 (internal quotation marks omitted).

With this as a backdrop, we turn to two of the principal arguments of the School District, namely, that the enrollment of Anthony at Upton Lake was not appropriate to his needs and that, because Anthony had not previously received special education and related services, his parents are not entitled to reimbursement even if Upton Lake provided him with an appropriate special education. The School District describes the latter argument as its "absolute defense."

1. The Appropriateness of the Upton Lake Placement

The School District argues that, because Anthony "did not receive specialized instruction in any of his primary areas

of need – written expression, handwriting, and math," Upton Lake was not an appropriate placement for him. The School District relies on Berger v. Medina City Sch. Dist., 348 F.3d 513, 523 (6th Cir. 2003), which held that a private placement was not appropriate because it had not provided the student with any of the special education services needed, even though the placement included smaller classes and the student had received better grades. The principle for which Medina is cited, however, is not as broad as the School District suggests. Medina held specifically that "a unilateral private placement cannot be regarded as 'proper under the [IDEA]' when it does not, at a minimum, provide some element of special education services in which the public school placement was deficient." Id. In this case, the concession of the School District that its IEP was inappropriate came after the testimony of one of its witnesses, a teacher at the Smith School, that "a regular fifth grade class might not be best suitable" for Anthony, even with "direct consultant teacher services" and "a one-to-one aide." Instead, she recommended a combined, self-contained fourth and fifth grade class in a classroom of nine students, as opposed to a regular classroom of 26-30 students, because she believed "a small class . . . would be the better place for him."

Moreover, the IHO also agreed that the placement of Anthony at the Smith School was deficient because of its class size, and the SRO accepted the concession of the School District that its placement was inappropriate. The small class size offered at Upton Lake was one element of the special education services necessary to address a significant deficiency in the inappropriate public school placement the School District offered Anthony, and it comes within the IDEA definition of "special education," namely, "specially designed instruction . . . to meet the unique needs of a child." 20 U.S.C. § 1401(29).

We need not decide that small class size alone rendered the Upton Lake placement appropriate because Anthony's teacher at Upton Lake, Ms. Fredericks, adapted her instruction to meet his needs. Ms. Fredericks worked with Anthony one-on-one, created a communications book, gave Anthony extra time to complete work, and allowed him to work in isolated areas of the classroom. Ms. Fredericks also adapted the methodology of instruction by allowing Anthony to take tests orally. The transcript of the hearing before the IHO includes testimony that Anthony received assistance from a volunteer teacher's assistant, who, while working with

other students, spent time with Anthony, and "assist[ed] A[nthony] greatly throughout the day."

Moreover, Anthony's social and academic progress, and his score on the Stanford Achievement Test, support the appropriateness of the placement. These factors, as discussed above, indicate that the placement was reasonably calculated to enable him to receive educational benefits, especially when coupled with the adaptations made by Anthony's teacher. While the SRO, reasoning without the benefit of Anthony's final grades, had emphasized that Anthony had failed math for the first and second quarter of 2001-2002, and that Upton Lake did not address his deficits in math, Judge Brieant noted that Anthony's grade in math increased from a 63 to a 91 and his reading grade had increased from a 67 to 91.

The School District also challenges the finding of Anthony's "phenomenal" performance on the Stanford Achievement Test, noting that" no supplemental evidence offered at trial established any baseline from which to draw this comparison." This argument ignores the testimony at trial that Anthony was given a portion of the Stanford Achievement Test as a placement exam in August 2001, prior to his enrollment at Upton Lake, that he was unable to

complete any problems in the math section, and that he completed only " a few" reading comprehension problems and that he was unable to write anything. Anthony's answers to this exam, and the test material itself, were entered as exhibits at trial. Contrary to the claim of the School District, this evidence provides a useful measure by which to compare Anthony's subsequent performance on the entire exam eight months later, whereupon he performed in the average or above average range in every subject except for three subcategories in mathematic procedures and reading comprehension.

The School District relies on Rafferty v. Cranston Pub. Sch. Comm., 315 F.3d 21, 26- 27 (1st Cir. 2002), for the proposition that "[e]ven if the child makes academic progress at the private school, 'that fact does not establish that such a placement comprises the requisite adequate and appropriate education.'" In Rafferty, parents of a child who had difficulty reading sought reimbursement for their child's unilateral placement in a reading clinic where she "spent four to five hours a day, five days a week alone with a clinician working on reading" but "did not study any other subjects, such as social studies, math, English, or science." Id. at 26 (emphasis

added). Because of the absence of instruction in any subject but reading, Rafferty held that the child's demonstrated progress in reading, while not surprising, was insufficient to demonstrate that her placement was appropriate. Id. at 26-27. Rafferty is plainly distinguishable on its facts from the present case because Anthony studied a wide range of academic subjects at Upton Lake.

Nor is this a case in which Anthony's progress can be attributed reasonably to "mere happenstance." Medina, 348 F.3d at 522 n.6. Anthony was provided with a small class size, which everyone agreed was critical, and his program was specially designed to accommodate his needs. The progress he made was more likely attributed to these factors than to "mere happenstance." Indeed, the IHO and SRO did not find Anthony's placement at Upton Lake inappropriate because the progress he made was "mere happenstance." Instead, they relied in significant part on the fact that, as of December 13, 2002, Anthony was doing poorly at Upton Lake and evidence suggested a lack of progress.

If Judge Brieant had reached the opposite conclusion based on the same record, we would likely not affirm that decision because"[a]n assessment of educational progress is a

type of judgment for which the district court should defer to the SRO's educational experience, particularly where . . . the district court's decision was based solely on the record that was before the SRO." M.S., 231 F.3d at 105. Judge Brieant, however, was able to rely on evidence that was not available to the SRO to conclude that Anthony had made significant progress. This progress, viewed together with small class size and the program offered at Upton Lake, is sufficient to support Judge Brieant's judgment that Anthony received an education "reasonably calculated to enable the child to receive educational benefits." Knable, 238 F.3d at 770. In reaching this conclusion, Judge Brieant recognized the deference to which the judgment of the SRO is generally entitled and he correctly applied the rule that, when reviewing administrative decisions, federal courts "must base their decisions on 'the preponderance of the evidence,' taking into account the evidence in the administrative record *and* 'any further evidence presented before the District Court by the parties.'" Grim v. Rhinebeck Cent. Sch. Dist., 346 F.3d 377, 380 (2d. Cir. 2003) (citing 20 U.S.C. § 1415(i)(2)(B)).

2. The School District's "Absolute Defense"

The School District argues that it has "an absolute legal defense" to Anthony's parents' claim for reimbursement, even if Upton Lake provided him with an appropriate public education. This defense is based on one of the 1997 amendments to the IDEA, 20 U.S.C. § 1412(a)(10)(C)(ii), which the School District argues, "established a statutory threshold for parents to recover tuition reimbursement when enrolling their child in a private school without the consent of the school district." Specifically, it argues that it may deny reimbursement to the parents of disabled students who had enrolled them in regular public or private schools prior to the emergence of the need for a free appropriate public education to meet their unique needs. Only after a learning disabled student enrolled in an inappropriate special education program offered by a public agency would his parents be free unilaterally to enroll him at an appropriate private school and seek reimbursement. Because Anthony never received special education and related services from a public agency prior to his enrollment

at Upton Lake, the School District argues, his parents are not entitled to reimbursement for his tuition there.

The justification offered for this argument is the assertedly plain language of 20 U.S.C. § 1412(a)(10)(C)(ii) which authorizes reimbursement to the parents of a disabled child, "who previously received special education and related services under the authority of a public agency" and who enrolled the child in a private elementary or secondary school without the consent or referral of the private agency, "if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to enrollment." 20 U.S.C. § 1412(a)(10)(C)(ii). Because the authority granted by this subsection applies to the reimbursement of parents of disabled children, " who previously received special education and related services under the authority of a public agency," the School District argues that it should be read as implicitly excluding reimbursement to parents who enrolled their child in a public or private school before the need for a free appropriate special education manifested itself. "The clear implication of the plain language, however, is that where a child has *not* previously received special education from a

public agency, there is no authority to reimburse the tuition expense arising from a parent's unilateral placement of the child in private school." Bd of Educ. v. Tom F., No. 01-6845, 2005 WL 22866, at *3 (S.D.N.Y. January 4, 2005). We disagree.

As in all statutory interpretation cases, we begin with the language of the statute. Our first task "is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." Barnhart v. Sigmon Coal Co., Inc., 534 U.S. 438, 450 (2002). Our inquiry ends, if the language of the statute is unambiguous and "the statutory scheme is coherent and consistent," unless the case comes within the category of cases in which the result reached by applying the plain language is sufficiently absurd to override its unambiguous terms. Id. at 450, 459 (internal quotation marks and citation omitted); United States v. X-Citement Video Inc., 513 U.S. 64, 69 (1994); Pub. Citizen v. United States Dep't of Justice, 491 U.S. 440, 454 (1989); Green v. Bock Laundry Mach. Co., 490 U.S. 504, 509 (1989). If, however, the terms of a statute are ambiguous, "we resort to the canons of statutory construction to help resolve the ambiguity." Gottlieb v.

Carnival Corp., 436 F.3d 335, 337 (2d Cir. 2006). Moreover, while the Supreme Court has said that it "rarely" invokes the need to avoid an absurd result to override the plain language of a statute, Barnhart, 534 U.S. at 459, we have long held that where a statute is ambiguous, it " should be interpreted in a way that avoids absurd results." See, e.g., United States v. Dauray, 215 F.3d 257, 264 (2d Cir. 2000).

Whether a statute is plain or ambiguous "is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole." Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997). We have applied a similar approach in determining whether a provision of a contract is ambiguous. Specifically, we have held that "[l]anguage is ambiguous when it is capable of more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement." O'Neil v. Retirement Plan for Salaried Employees of RKG, Inc., 37 F.3d 55, 59 (2d Cir. 1994) (internal quotations omitted).

The plain language of 20 U.S.C. § 1412(a)(10)(C)(ii) does not say that tuition reimbursement is only available to

parents whose child had previously received special education and related services from a public agency, nor does it say that tuition reimbursement is not available to parents whose child had not previously received special education and related services. Indeed, the School District's need to rely on an inference to be drawn from the plain language, rather than the language itself, suggests a degree of ambiguity that would not necessarily be present if § 1412(a)(10)(C)(ii) was the only section of the IDEA that spoke to the issue of the remedy that a district court may award. This section, however, is not the only section or even the principal section of the IDEA that speaks to this issue.

Another section of the IDEA, 20 U.S.C. § 1415(i)(2)(C), authorizes a district court hearing a challenge to the failure of a local education agency to provide a free appropriate public education to "grant such relief as [it] determines is appropriate." In Burlington, 471 U.S. 359, the Supreme Court held that the identically worded predecessor of this section, 20 U.S.C. § 1415(e)(2) (1984), authorized the equitable remedy of tuition reimbursement to parents who had enrolled their disabled child in a private school while they successfully litigated the issue of the inappropriateness of his

public placement. Then-Justice Rehnquist explained the reasoning of the decision as follows:

> The statute directs the court to "grant such relief as [it] determines is appropriate." The ordinary meaning of these words confers broad discretion on the court. The type of relief is not further specified, except that it must be "appropriate." Absent other reference, the only possible interpretation is that the relief is to be "appropriate" in light of the purpose of the Act. As already noted, this is principally to provide handicapped children with "a free appropriate public education which emphasizes special education and related services designed to meet their unique needs." The Act contemplates that such education will be provided where possible in regular public schools, with the child participating as much as possible in the same activities as non-handicapped children, but the Act also provides for placement in private schools at public expense where this is not possible. See § 1412(5); 34 CFR §§ 300.132, 300.227, 300.307(b), 300.347 (1984). In a case where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate, it seems clear beyond cavil that "appropriate" relief would include a prospective injunction directing the school officials to develop and

> implement at public expense an IEP placing the child in a private school.

Burlington, 471 U.S. at 369-70.

Prospective relief alone is not a sufficient remedy because the process of obtaining the relief "is ponderous" and a "final judicial decision on the merits of an IEP will in most instances come a year or more after the school term covered by that IEP has passed." Id. at 370. Under these circumstances, "it would be an empty victory to have a court tell [parents who placed their child in a private school] several years later that they were right," yet deny them reimbursement for the placement. Id. "If that were the case," Justice Rehnquist concluded, "the child's right to a *free* appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete. Because Congress undoubtedly did not intend this result, we are confident that by empowering the court to grant 'appropriate' relief Congress meant to include retroactive reimbursement as an available remedy in a proper case." Id.

The language of § 1415(e)(2), upon which Burlington relied, was unchanged by the 1997 revision of the IDEA and

continues to provide that the court "shall grant such relief as the court determines is appropriate." 20 U.S.C. § 1415(i)(2)(C)(iii). The re-enactment of § 1415(e)(2), without change, is significant because it can be presumed that Congress intended to adopt the construction given to it by the Supreme Court and made that construction part of the enactment. Shapiro v. United States, 335 U.S. 1, 16 (1948); Johnson v. Manhattan RyCo., 289 U.S. 479, 500 (1933). Whether 20 U.S.C. § 1412(a)(10)(C)(ii), upon which the School District relies, was intended to eliminate the power of a district court to grant the relief to which Anthony's parents would otherwise be entitled, involves a question to which the IDEA does not provide an unambiguous answer. Indeed, the assertedly "clear implication of the plain language" of § 1412 (a)(10)(C)(ii), Tom F., 2005 WL 22866, at *3, is inconsistent with the clear implication of § 1412(a)(10)(C)(i), which in relevant part provides that the obligation of a state to offer a free appropriate education "does not require a local educational agency to pay for the cost of education . . . of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such

private school or facility." The implication of this subsection is that reimbursement is available where, as here, the agency failed to make a free public education available to the child. See Carmel Cent. Sch. Dist. v. V.P. ex rel. G.P., 373 F.Supp 2d 402, 414 (S.D.N.Y. 2005) ("Subsection (i), read alone, suggests that the failure of a district to make a [free appropriate public education] available to a student in the first instance would entitle the parents to reimbursement even if the child had not previously received services.").

Under these circumstances, we think it is hardly clear from the fact that § 1412 (a)(10)(C)(ii) provides for parental reimbursement in one circumstance, that it excludes reimbursement in other circumstances. Our conclusion is supported by the cases in which a party relies on the Latin maxim "*expressio unius est exclusio alterius*," that the express statutory mention of certain things impliedly excludes others not mentioned. The School District may not invoke this maxim here, because it "applies only when the statute identifies a series of two or more terms or things that should be understood to go hand in hand, thus raising the inference that a similar unlisted term was deliberately excluded." United States v. City of New York, 359 F.3d 83, 98 (2d Cir.

2004) (internal quotation marks and citation omitted). Nevertheless, even where the maxim is otherwise applicable, the Supreme Court has not treated as conclusive the inference that Congress intended to exclude that which it did not explicitly include. Instead, it has treated the maxim "as but an aid to construction." Sec. & Exch. Comm'n v. C.M. Joiner Leasing Corp., 320 U.S. 344, 351 n.8 (1943). Indeed, only recently the Supreme Court held that "[w]e do not read the enumeration of one case to exclude another unless it is fair to suppose that Congress considered the unnamed possibility and meant to say no to it." Barnhart v. Peabody Coal Co., 537 U.S. 149, 168 (2003).

Where, as here, the terms of a statute are ambiguous, we turn to the " traditional canons of statutory construction to resolve the ambiguity." United States v. Peterson, 394 F.3d 98, 105 (2d Cir. 2005). "Although the canons of statutory interpretation provide a court with numerous avenues for supplementing and narrowing the possible meaning of ambiguous text," Nat. Res. Def. Council v. Muszynski, 268 F.3d 91, 98 (2d Cir. 2001), several rules are particularly helpful in interpreting the statutory provision at issue in this case. Where the terms of a statute are ambiguous, we "focus

upon the 'broader context' and 'primary purpose' of the statute." Can. Life Assurance Co. v. Converium Ruckversicherung (Deutschland) AG, 335 F.3d 52, 57 (2d Cir. 2003) (quoting Castellano v. City of New York, 142 F.3d 58, 67 (2d Cir. 1998) (citations omitted); see also Nat. Res. Def. Council, 268 F.3d at 98 ("[W] hen determining which reasonable meaning should prevail, the text should be placed in the context of the entire statutory structure."). Ultimately, as Justice Jackson observed, "courts will construe the details of an act in conformity with its dominating general purpose, will read text in the light of context and will interpret the text so far as the meaning of the words fairly permits so as to carry out in particular cases the generally expressed legislative policy." Joiner, 320 U.S. at 350-51; see also Richards v. United States, 369 U.S. 1, 11 (1962); Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945), aff'd, 326 U.S. 404 (1945) ("[S]tatutes always have some purpose or object to accomplish, whose sympathetic and imaginative discovery is the surest guide to their meaning.") (Hand, L., J.) (quoted with approval in Pub. Citizen, 491 U.S. at 455).

A second and related rule of statutory construction is that the meaning of an ambiguous statutory provision is

"clarified by the remainder of the statutory scheme . . . [when] only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." United States v. Cleveland Indians Baseball Co., 532 U.S. 200, 217-18 (2001) (quoting United Sav. Ass'n. of Tex. v. Timbers of Inwood Forest Assocs., Ltd., 484 U.S. 365, 371 (1988)). The rule is particularly applicable here, because the issue involves an ambiguity created by the tension between different sections of the IDEA rather than the interpretation of an ambiguous word or phrase.

Applying these rules in the present case, we again observe that the express purpose of the IDEA is to ensure that a free appropriate public education is " available to all children with disabilities." Indeed, the IDEA is the legislative centerpiece of "an ambitious federal effort to promote the education of handicapped children." Voluntown, 226 F.3d at 62 (quoting Walczak, 142 F. 3d at 122). Its central purpose is to "ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs and prepare them for further education, employment, and independent living" and "to ensure that the

rights of children with disabilities and parents of such children are protected." 20 U.S.C. § 1400(d)(1)(A)-(B). The IDEA also provides that a state's eligibility for IDEA funding is that it make available "free appropriate public education . . . to all children with disabilities." 20 U.S.C. § 1412(a)(1).

One of the primary ways in which the IDEA seeks to ensure that children with disabilities receive a free appropriate education is by conferring broad discretion on the district court to grant relief it deems appropriate to parents of disabled children who opt for a unilateral private placement in cases where the parents' placement is determined to be proper and the proposed IEP is determined to be inadequate. See 20 U.S.C. § 1415(i)(2)(C)(iii). While the manner in which the authority is exercised may be guided by the various subsections of § 1412(a)(10), which mainly codified existing law in significant respect, Voluntown, 226 F.3d at 69 n.9, nothing in the legislative history (to be discussed shortly) suggests that Congress sought to alter prior law in a manner that would constrain the power of a district court judge to award reimbursement for a private placement where a free appropriate public education had not been provided under the circumstances here.

The Supreme Court has also instructed us that, because "[t]he [IDEA] was intended to give handicapped children both an appropriate education and a free one; it should not be interpreted to defeat one or the other of those objectives." Burlington, 471 U.S. at 372 ; Carter, 510 U.S. at 12-13; see also Still v. DeBuono, 101 F.3d 888, 893 (2d Cir. 1996). The construction of the § 1412(a)(10)(C)(ii) that the School District urges upon us would defeat both purposes of the IDEA. The construction we adopt is the only one that " produces a substantive effect that is compatible with the rest of the law." Cleveland Indians Baseball Co., 532 U.S. at 217-18 (quoting Timbers of Inwood Forest Assocs., Ltd., 484 U.S. at 371).

This brings us to the last rule of statutory construction applicable here. This rule, as we previously observed, is that ambiguous statutes are to be construed so as to avoid absurd results. The School District's interpretation of 20 U.S.C. § 1412(a)(10)(C)(ii) would produce such results. It would, for instance, prevent children who are provided with inadequate IEPs from receiving a free appropriate public education if their disabilities were detected reached school age. It would also place the parents of children with disabilities in the

untenable position of acquiescing to an inappropriate placement in order to preserve their right to seek reimbursement from the public agency that devised the inappropriate placement. Such a result, it has been suggested, "ensures that a parent's rejection of a public school placement is not based on mere speculation as to whether there commended school placement would have been appropriate." Tom F., 2005 WL 22866, at *3. This suggestion turns on the erroneous assumption that parents would have to keep their child in a public school placement until it was clear that their "speculation" was borne out by a wasted year of actual failure. Such a "first bite" at failure is not required by the IDEA. All that is required of parents who have received an IEP for their child is that they provide the appropriate public agency with reasonable notice that they plan to "reject [] the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense." 20 U.S.C. § 1412(a)(10)(C)(iii)(I)(aa)-(bb). Because such notice was provided here, Anthony's parents would have been free to enroll him in a private school if they had enrolled him first in

the Smith School as provided in the IEP and then removed him thereafter.

We believe that it is unreasonable to suggest that Anthony's parents were legally required to engage in such a useless and potentially counterproductive exercise, given Anthony's "need for constant and consistent care, even brief periods of inappropriate schooling could lead to tremendous educational, social, emotional, and psychological deterioration." Connors v. Mills, 34 F. Supp. 2d 795, 804 (N.D.N.Y. 1998). We decline to interpret 20 U.S.C. § 1412(a)(10)(C)(ii) to require parents to jeopardize their child's health and education in this manner in order to qualify for the right to seek tuition reimbursement.

Our interpretation is consistent with that of the Department of Education's Office of Special Education & Rehabilitative Services. Specifically, the agency wrote in response to an inquiry:

> In our view, it does not appear that this question presented by your query – namely, whether actual receipt of some form of special education and related services from a public agency is a prerequisite for a parent's ability to seek tuition reimbursement for all or part of the cost of their child's unilateral

> private school placement - is answered by §612(a)(10)(C) [20 U.S.C. § 1412(a)(10)(C)] of IDEA '97. We do not view §612(a)(10)(C) [20 U.S.C. § 1412(a)(10)(C)] as foreclosing categorically an award of reimbursement in a case in which a child has not yet been enrolled in special education and related services under the authority of a public agency. Reimbursement is an equitable remedy that courts and hearing officers may order in appropriate circumstances. In such a case, a parent may wish to avail him or herself of due process and judicial action, so that a hearing officer or court can determine whether there has been a denial of [a free appropriate public education], and, if so, whether and to what extent tuition reimbursement would be warranted.

Letter to Susan Luger, listed in 65 Fed. Reg. 9178 (Feb. 23, 2000) and reprinted in 33 I.D.E.L.R. 126 (March 19, 1999). While the interpretation comes in the form of an informal letter, deference to a policy letter may be appropriate where the statutory language is ambiguous. Honig, 484 U.S. at 325 n.8. We have suggested that the degree of deference remains unclear. See St. Johnsbury Acad. v. D.H., 240 F.3d 163, 171 (2d Cir. 2001). Nevertheless, we need not resolve this issue here because we do not so much defer to the OSEP letter as

we take comfort from the fact that it is consistent with our own construction of an ambiguous statute.

Contrary to the School District's argument, the legislative history does not alter our conclusion. The issue is addressed in the Report of the House Committee on Education and the Workforce. The Report begins by explaining that "[t]he bill makes a number of changes to clarify the responsibility of public school districts to children with disabilities." H. R. No. 105-95, at 92 (1997), *as reprinted in* 1997 U.S.C.C.A.N. 78, 90. One of the changes to the IDEA is the addition of 20 U.S.C. § 1412, the purpose of which is explained as follows:

> Section 612 [20 U.S.C. § 1412] also specifies that parents may be reimbursed for the cost of a private educational placement under certain conditions (i.e., when a due process hearing officer or judge determines that a public agency had not made a free appropriate public education available to the child, in a timely manner, prior to the parents enrolling the child in that placement without the public agency's consent). Previously, the child must have had received special education and related services under the authority of a public agency.

H.R. Rep. No. 105-95, at 92 (1997), *as reprinted in* 1997 U.S.C.C.A.N. 78, 90.

At best, this language is an awkward paraphrase of the ambiguous statutory language which refers to "the parents of a child with a disability, who previously received special education and related services under the authority of a public agency." Again, the statutory language does not expressly exclude reimbursement where special education and related services have not been previously provided, it only provides a basis for the argument that Congress implicitly excluded reimbursement in these circumstances. The district judge in Tom F., however, read the language in the House Report to require explicitly that the child "must" have "[p]reviously . . . received" such services as a condition to the receipt of reimbursement of his parents. 2005 WL 22866, at *3. We cannot agree.

A natural reading of the word "previously," in the context of a report detailing changes to the IDEA, would suggest a reference to the IDEA's previous requirements. Thus, the first sentence of the paragraph unequivocally provides reimbursement for a private placement "when a due process hearing officer or judge determines that a public

agency has not made a free appropriate public education available to the child, in a timely manner, prior to the parents enrolling the child in that placement without the public agency's consent." The second sentence explains that "[p]reviously, the child must have received special education and related services under the authority of a public agency." (emphasis added). To paraphrase the words of the Supreme Court in an analogous context, Lindh v. Murphy, 521 U.S. 320, 330 (1997), "[a] thoughtful Member of the Congress" reading this explanation for a change in prior law would have very likely concluded (1) that "previously," meaning prior to the proposed amendment to the IDEA, parents could receive reimbursement for a private placement only if the child received special education and related services under the authority of a public agency and (2) that the change afforded by the proposed amendment would permit funding even where the disabled child had not previously received such special education and related services. This is just the opposite of what the School District and Tom F. argue is the clearly expressed intent of Congress.

The House Report gives no indication that Congress intended to amend the IDEA's rules regarding tuition

reimbursement. Indeed, the House Report makes no reference to prior law on the issue and expresses no intent to limit the discretion that Burlington vested in district courts to award reimbursement pursuant to 20 U.S.C. § 1415(i)(2)(B). Nor does it explain the reason why it attached the condition at issue here to private placement reimbursement. Indeed, the House Report is as significant for what it does not say as for what it does say.

Justice Scalia has marshaled persuasively the dangers of relying on congressional committee reports in interpreting statutes. Antonin Scalia, A Matter of Interpretation 19-36 (Princeton University Press, 1998). We have not accepted Justice Scalia's argument that such reports should never be resorted to in construing a statute. See, e.g., Murphy v. Arlington Cent. Sch. Dist. Bd. of Educ., 402 F.3d 332, 336-37 (2d Cir. 2005). Nevertheless, the House Report in this case is of a kind that calls to mind the admonition that "[r]eliance on legislative history in divining the intent of Congress is, as has often been observed, a step to be taken cautiously." Piper v. Chris-Craft Indus. Inc., 430 U.S. 1, 26 (1977). We decline to take that step here and to pay any deference to the confusing explanation of the purpose of § 1412(a)(10)(c)(ii). Cf.

Gottlieb, 436 F.3d at 337-38, (holding that resort to legislative history is appropriate only if the plain language of the statute and the canons of statutory interpretation fail to resolve an ambiguity).

This brings us to the last leg of the School District's argument – its reliance on Greenland Sch. Dist. v. Amy N., 358 F.3d 150 (1st Cir. 2004). Greenland held only that parents of a learning disabled child, who unilaterally placed their child in a private school without notice to the local educational agency of their child's need for special education and without offering the agency an opportunity to prepare an IEP that is appropriate to the child's needs, were not eligible for tuition reimbursement. Id. at 159-60. Indeed, rather than simply denying the parent's claim for reimbursement on the ground that their child had not previously received special education and related services from a public agency, Greenland canvassed the entire statutory scheme, including § 1412(a)(10)(c)(ii), and concluded that "[t]hese statutory provisions make clear Congress's intent that *before* parents place their child in private school, they must at least give notice to the school that special education is at issue. This serves the important purpose of giving the school system an

opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and determine whether a free appropriate public education can be provided in the public schools." Id. at 160 (emphasis in original) (citations omitted). We do not regard Greenland as dispositive.

Greenland's discussion of 20 U.S.C. §1412(a)(10)(C)(ii) arose from its perceived need to deal with the subsection immediately preceding it. Again, this subsection, §1412(a)(10)(C)(i), says that a local education agency is not required to pay for the cost of education, including special education and related services, "if that agency made a free public education available to the child and the parents elected to place the child in such private school or facility." This language troubled the Greenland Court, because it implied that parents are entitled to reimbursement if a free appropriate public education was not provided "where, as here [in Greenland], the local education agency was never informed while the child was in public school that the child might require special education services." 358 F. 3d at 159. This "seeming ambiguity," according to Greenland, "disappears when considered in light of the section's

affirmative requirement that 'the parents of a child with a disability, who previously received special education and related services under the authority of a public agency' can receive reimbursement for their unilateral placement of the child in private school only 'if [a]court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.'" Id. (quoting 20 U.S.C. § 1412(a)(10)(C)(ii)). Greenland continued as follows:

> These threshold requirements are key to this case: tuition reimbursement is only available for children who have previously received "special education and related services" while in the public school system (or perhaps those who at least timely requested such services while the child is in public school). There is no dispute that neither Katie's parents nor anyone else requested an evaluation for Katie while she was at Greenland. There is also no dispute that she was removed from Greenland for reasons having nothing to do with any issue about whether Katie was receiving [a free appropriate public education].

Id. at 159-60 (emphasis added). The Greenland Court then went on to deny the parents' claim for reimbursement because

of their failure to alert the School District of Katie's need for special education and related services while she was in public school. We agree completely with the result reached in Greenland. Indeed, we reached the same result in Voluntown, 226 F.3d at 68-69, without reference to § 1412(a)(10)(C)(ii).

Our problem with the analysis in Greenland is that it assumes that the ambiguous language of § 1412(a)(10)(C)(ii) is clear by adding the word "only" to the language of the subsection. Indeed, not a single word of the language we have emphasized in the foregoing quote appears in the language of the subsection. This includes the suggestion that a child in public school need not have previously received "special education and related services;" the child need only have made a request for it while in a public school. Simply stated, without discussion or analysis, Greenland resolved the issue of the ambiguity of § 1412(a)(10)(C)(ii) by simply amending the language itself. Moreover, it did so in a way, perhaps inadvertently, that implicitly suggested an arbitrary distinction between children enrolled in a regular public school and children enrolled in a regular private school. Perhaps even more troubling is that none of this discussion was necessary, because the subdivision immediately following

§1412(a)(10)(C)(ii) makes "clear Congress's intent that *before* parents place their child in private school, they must at least give notice to the school that special education is at issue." Greenland, 358 F.3d at 160 (emphasis in original) (relying on 20 U.S.C. § 1412(a)(10)(C)(iii)). Indeed, the latter subsection expressly states that "[t]he cost of reimbursement described in clause (ii) may be reduced or denied," if the prescribed notice is not given, 20 U.S.C. § 1412(a)(10)(C)(iii)(I), or "upon a judicial finding of unreasonableness with respect to actions taken by the parents," 20 U.S.C. § 1412(a)(10)(C)(iii)(III).

Separate and apart from subsection 1412(a)(10)(C)(ii), we have held that it is inequitable to permit reimbursement under the circumstances in Greenland. As we have observed: "[C]ourts have held uniformly that reimbursement is barred where parents unilaterally arrange for private educational services without ever notifying the school board of their dissatisfaction with their child's IEP." M.C., 226 F.3d at 68. Indeed, in Carmel, 373 F. Supp. 2d at 417, where the district judge followed the analysis of Greenland as it related to § 1412(a)(10)(C)(ii), she also denied reimbursement on the

alternative ground that "the parents are not equitably entitled to tuition reimbursement." Id. at 407.

Unlike the parents of the child in Greenland, who provided "no notice at all to the school system before Katie's removal from Greenland that there was any issue about whether Katie was in need of special education," 358 F.3d at 160, in the instant case, Anthony's parents provided the School District with ample notice that he was in need of special education and the School District evaluated his needs in 2000, when he was classified as learning disabled, and again in 2001 at the request of his parents. When the School District provided Anthony with an IEP that Anthony's parents believed was inappropriate, Anthony's parents gave timely notice of their dissatisfaction to the School District. Before his enrollment in Upton Lake, the School District had every opportunity to evaluate Anthony in the regular private school that he was attending and determine whether "a free appropriate public education can be provided in the public schools." Id. After forcing a hearing before an IHO, it conceded that it had failed to provide the free appropriate public education required by the IDEA. Section 1415(i)(2)(B), as construed by the Supreme Court in

Burlington, provides an ample basis for the award of reimbursement to Anthony's parents. Section 1412(a)(10)(C)(ii) does not prohibit it.

We have considered carefully the other arguments raised by the School District and conclude that they are without merit. Accordingly, the judgment of the district court is affirmed.

Appendix C - Findings of Fact and Conclusions of Law of Charles L. Brieant, USDJ, Dated August 9, 2004 [Pages 56a – 74a]

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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FRANK AND DIANE GELORMINO,
parents of a disabled student,
ANTHONY GELORMINO,

Plaintiffs,

-against-

BOARD OF EDUCATION OF HYDE PARK CENTRAL SCHOOL DISTRICT,

Defendant.

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03 Civ. 5320 (CLB)

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Brieant, J.

The Court conducted a non-jury trial on June 21, 2004 regarding whether Plaintiffs Dianne and Frank Gelormino are entitled to tuition reimbursement for their unilateral placement of their son Anthony Gelormino ("Anthony") at Upton Lake Christian School ("Upton Lake") for the 2001-02 school year. Plaintiffs called three witnesses during the non-jury trial Dianne Gelormino, Erika Ann Schumacher, a fifth grade teacher at Upton Lake, and Linda Fredericks, Anthony's fourth grade teacher at Upton Lake. Plaintiffs and

Defendant Board of Education of Hyde Park Central School District ("School District") also relied on the evidence contained in the administrative record previously submitted to the Court. The Court makes the following findings of fact and conclusions of law.

Anthony was born on May 21, 1991 and diagnosed with Attention Deficit Hyperactivity Disorder at the age of three. He attended private schools through the fourth grade. The Committee on Special Education ("CSE") classified Anthony as learning disabled in April 2000 although they changed his classification to "other health impaired" on Anthony's 2001-2002 Individualized Education Plan ("IEP").

On August 8, 2001, the CSE conducted its annual review of Anthony's performance from the previous academic year to develop an IEP for the following 2001-2002 school year. The CSE recommended that Anthony attend a regular education class in the school district at Ralph R. Smith Elementary School, that he receive direct consultant teacher services for math and organizational skills, a full-time individual aide, and related services of counseling, group occupational therapy, skilled nursing services as needed, a behavior modification program and testing modifications. The

CSE also indicated on Anthony's IEP that his parents would dually enroll Anthony at Bishop Dunn Memorial School, a private-school in Newburgh, New York. IHO Hearing, SD Ex. 24 & 25. However, Plaintiffs decided to enroll Anthony at Upton Lake where he was placed in the fourth grade.

On August 10, 2001, Mrs. Gelormino requested an impartial hearing because she disagreed with the CSE's recommendation that Anthony only receive special education services if he attended a school within the school district. IHO Hearing, SD Ex. 26. She also felt that Anthony needed a smaller class size based on the advice of Dr. Miriam Lacher, a neuropsychologist who previously tested Anthony. Trial Transcript ("Trial Tr.") at 45-46. Anthony's class at Upton Lake had 14 students while a comparable class in the school district included 26 to 30 students.

The impartial hearing began on November 1, 2001 before impartial hearing officer ("IHO") Eric Nachman and concluded on December 13, 2001. MaryJane Montalto, the School District's psychologist, testified that she observed Anthony at the Bishop Dunn Memorial School in the spring of 2001 for about thirty-five minutes during math class. Anthony was not involved with the rest of the class as he was

engaged in "off-task behaviors". IHO Tr. at 43-44.

Dr. Nancy Baird, a licensed psychologist, also testified that she starting working with Anthony in April of 2001. She observed that Anthony "was having some difficulties with anger management, some depressive quality, certainly some behavioral concerns in school and then also academic difficulties, frustrations with school, frustrations with dealing with how he felt about himself, self-esteem issues. ... [H]e has ADHD and ..:a depressive disorder which affects his academic learning and [he] also has some learning disabilities." IHO Tr. at 201-03. Dr. Baird recommended a small classroom setting for Anthony and also felt that his class at Upton Lake was an appropriate program. IHO Tr. at 205 & 222.

In a decision dated February 2, 2002 ("IHO Decision"), the IHO denied Plaintiffs request for tuition reimbursement for the 2001-2002 school year. He found that Anthony's [EP was inappropriate and that Plaintiffs unilateral placement of Anthony at Upton Lake was inappropriate because he was not making academic or social progress. The IHO based his conclusion on the fact that Anthony was inattentive in class, he received "needs improvement" in

English, bible, history and science, "needs improvement" in behavior, and unsatisfactory grades in reading and math on his Five Week Progress Report. In addition, Anthony's first grading period report card demonstrated that Anthony needed improvement in math, language arts, penmanship, spiritual growth, personal growth, social growth and independent work, and that he received unsatisfactory grades in reading worksheet activities, applying spelling skills to writing and work and study habits. However, the IHO also stated that "equities favored tuition reimbursement if... the parent's placement is [later held to he] appropriate." See IHO Decision. The IHO issued his decision based on evidence received through December 13, 2001.

Plaintiffs appealed the 1130's decision to the State Review Officer ("SRO") Paul F. Kelly. In a decision dated March 20, 2003 ("SRO Decision"), the SRO affirmed the IHO's Order denying Plaintiffs' tuition reimbursement because Plaintiffs failed to prove that Upton Lake was an appropriate placement for Anthony. Specifically, the SRO found that although "the program at Upton Lake appeared to address some of [Anthony's] organizational and social needs, it did not adequately address his deficits in math, written

expression, and handwriting with special education instruction. The program at Upton Lake provided [Anthony] with accommodations, not specialized instruction in the main areas of need." SRO Decision at 9. The SRO issued his decision based on information in the record for Anthony's first two marking periods at Upton Lake.

Plaintiffs filed a Complaint in this Court on July 18, 2003, seeking tuition reimbursement for their unilateral placement of Anthony at Upton Lake for tie 2001-2002 school year and injunctive and declaratory relief ordering the School District to provide a one-to-one teacher's aide and direct consultant teacher services at Upton Lake. The School District filed an Article 78 petition in state court on the same day, seeking to set aside the SRO Decision to the extent that the. SRO directed the School District to provide Anthony with a direct consultant teacher and a one-to-one aide at Upton Lake. After the School District filed a motion to dismiss the Complaint, the parties informed the Court that Plaintiffs removed Anthony from Upton Lake and enrolled him at Haviland Middle School, a public school within the district. By Memorandum and Order dated April 15, 2004, the Court dismissed Plaintiffs' claims for injunctive and

declaratory relief as moot and retained jurisdiction over Plaintiffs' claim for tuition reimbursement. Plaintiffs' post-trial memorandum also informed the Court that the state court action was dismissed as moot by Decision and Order dated May 17, 2004.

The Court conducted a non-jury trial on June 21, 2004 where Plaintiffs' called three witnesses in order to supplement the record. Erika Ann Schumacher is currently a fifth grade teacher at Upton Lake. Mrs. Schumacher administered a placement test to Anthony in August 2001 once he enrolled at Upton Lake. Anthony was unable to complete the math procedure portion of the test and he only attempted the first five problems. Anthony was also unable to complete the reading comprehension portion of the test and he had to ask for four breaks during this portion of the exam. Finally, Anthony did not write anything during the writing component of the exam. Mrs. Schumacher believed that Anthony was frustrated throughout the exam. Mrs. Schumacher recommended that Anthony be placed in the fourth grade as a result of his performance on the test.

Mrs. Linda Fredericks, Anthony's fourth grade teacher at Upton Lake, testified that one student or parent volunteer

assisted her with the class of fourteen students one-half hour a week. Mrs. Fredericks testified that Anthony made steady progress throughout the school year as his grades improved in most subject areas, he was able to work independently, he became more emotionally stable as he would not become frustrated as easily as in the past, and his behavior was much better. Mrs. Gelormino also testified, consistent with Mrs. Fredericks, concerning Anthony's progress during the 2001-2002 school year.

IDEA

The Individuals with Disabilities Act ("IDEA"), 20 U.S.C. § 1400 *et. seq.*, is "an ambitious federal effort to promote the education of handicapped children. *Bd. of Educ. v. Rowley,* 458 U.S. 176, I 79(1982). "Under the Act, states that receive federal funding from Congress are required to provide all children with disabilities a 'free appropriate public education," *MC. ex rel. Mrs. C. v. Voluntown Rd. of Ethic.* 226 F.3d 60, 62 (2d. Cir. 2000) (quoting 20 U.S.C. § 1412(a)(1)(A). A "free appropriate public education" must include "special education and related services" tailored to meet the unique needs of the particular child, 20 U.S.C. § 140

1(8), and be "reasonably calculated to enable the child to receive educational benefits." *Bd. of Educ. v. Rowley,* 458 U.S. 176, 207 (1982).

The particular needs of a disabled child and the services required to meet those needs must be set forth at least annually in a written IEP as provided in 20 U.S.C. § 1414(d)(4)(A)(i). See *M.C. ex rel. Mrs. C. v. Voluntown 3d. of Educ.* 226 F.3d 60. 62 (2d. Cir. 2000). Parents who disagree with school authorities about the appropriateness of their child's placement under the IEP may unilaterally enroll the child in a private program and request retroactive tuition reimbursement. See *School Comm. of Burlington v. Dept. of Educ.,* 471 U.S. 359, 370 (1985). The IDEA requires parents seeking to challenge an IEP to request an impartial due process hearing to object to the IEP, see 20 U.S.C. § 1415(f), before an IHO appointed by the local board of education. See 20 U.S.C. § 1415(f)(1); N.Y. Educ. Law § 4404(1). The School District has the burden of showing the appropriateness of the IEP at the hearing. *Grim v. Rhinebeck Central School District,* 246 F.3d 377, 379 (2d. Cir. 2004). The IHO's decision may be appealed to a SRO. See 20 U.S.C. § 1415(g). Either party objecting to the SRO decision may bring a civil

action in a federal court of the United States. 20 U.S.C. § 1415(i)(2).

Judicial Review under the IDEA

When reviewing administrative decisions, federal courts must base their decisions on "the preponderance of the evidence," taking into account the evidence in the administrative record *and* any further evidence presented before the District Court by the parties. *Grim v. Rhinebeck Central School District,* 246 F.3d 377, 380 (2d. Cir. 2004). (citing 20 U.S.C. § 1415(i)(2)(B)). "While federal courts do not simply rubberstamp administrative decisions, they are expected to give 'due weight' to these proceedings, mindful that the judiciary generally 'lacks the specialized knowledge and experience necessary to resolve persistent and difficult questions of educational policy." *Walczak v. Florida Union Free School District,* 142 F.3d 119, 129 (2d Cir. 1998) (quoting *Rd. of Educ. v. Rowley,* 458 U.S. at 206, 208 (1982)). "For a federal court to conduct an independent review of a challenged IEP without impermissibly meddling state educational methodology, it must examine the record for any objective evidence indicating whether the child is likely

to make progress or regress under the proposed plan." *Walczak v. Florida Union Free School District,* 142 F.3d 119, 130 (2d Cir. 1998).

Tuition Reimbursement

Under the IDEA, a party may seek tuition reimbursement requiring the education provider to "belatedly pay expenses that it should have borne in the first place had it developed a proper IEP." *School Comm.. of Burlington v. Dept. of Educ.,* 471 U.S. 359, 370-71 (1985). Whether the parents of a disabled child are entitled to reimbursement for the costs of placing their child in a private school depends on (1) whether the challenged IEP was adequate to provide the child with a free appropriate public education; and (2) whether the private educational services obtained by the parents were appropriate to the child's needs. *M.C. ex rel. Mrs. C'. v. Voluntown Bd. of Educ.* 226 F.3d 60, 66 (2d. Cir. 2000) (citing *School Comm. of Burlington v. Dept. of Educ.,* 471 U.S. 359, 370 (1985)). Once it is established that a school district's IEP was inappropriate, the burden shifts to the parents of a disabled child to demonstrate that the private placement of their child was proper under the IDEA. *M.S. v.*

Bd. of Educ. of Yonkers, 231 F.3d 96, 104 (2d. Cir. 2000).

When determining whether an IEP is adequate to provide a child with a free appropriate public education a court must consider: "(1) whether the School Board complied with the procedural requirements of IDEA, and (2) whether the IEP was 'reasonably calculated' to confer 'educational benefits.'" *M.S. v. Bd. of Educ. of Yonkers,* 231 F.3d 96, 102 (2d. Cir. 2000) (quoting *Bd. of Educ. v. Rowley,* 458 U.S. 176, 206-07 (1982)). The School District does not challenge the IHO's and SRO's findings that it did not provide Anthony a free appropriate public education. Accordingly, the Court only needs to address whether Anthony's placement at Upton Lake was appropriate under the IDEA.

Although Upton Lake is not approved by the New York State Education Department as a private school for the education of children with disabilities, the Supreme Court has held that a parent is not barred from receiving tuition reimbursement solely because their unilateral placement of a disabled child was in a school not on the state's approved list of private schools eligible to contract with the state for the education of students with disabilities. See *Florence County School District Four v. Carter,* 510 U.S. 7, 14 (1993). To

determine the appropriateness of parental placement, courts must determine whether the private placement is reasonably calculated to enable the child to receive educational benefits: While a student's grades can be considered to determine whether his school placement constitutes meaningful educational benefit, "a child's academic progress must be viewed in light of the limitations imposed by the child's disability." *Mrs. B. v. Milford Bd. Of Educ.*, 103 F.3d 1114, 1121 (2d. Cir. 1997) (citing *Bd. of Educ. v. Rowley*, 458 U.S. 176, 202-03 (1982)).

The Court finds that in light of the additional evidence received during the non-jury trial, Plaintiffs' unilateral placement of Anthony in Upton Lake for the 2001-2002 school year was appropriate. Anthony's fourth grade teacher Mrs. Fredericks testified as to his progress during the second half of the school year. Specifically, she stated that Anthony "continued to make steady progress. He gained in emotional stability. He gained in the ability to work independently. He improved his grades tremendously. He learned how to work with other students more effectively." Trial Tr. at 23. Anthony's grades increased in every subject with the exception of spelling from the first to the fourth marking

period. Most notably, his grade in math increased from a 63 to a 91 and his reading grade increased from a 67 to a 91. Trial Ex. 1.

Mrs. Fredericks also testified that Anthony's performance on the Stanford Achievement Test was phenomenal. Trial Tr. at 32. Mrs. Fredericks administered this intensive timed exam in April to her class and Anthony completed the test without any special accommodations. The test took place over a five or six day period for two to four hours each day. Mrs. Fredericks testified that "[for a student, who a few months ago couldn't even complete a simple one-on-one test, to have sat for a week and completed this kind of intensive timed exam and done so well speaks volumes of what he learned at Upton Lake." Trial Tr. at 32. Anthony only scored below average in two subcategories under math procedure and one subcategory under reading comprehension. He scored either average or above average in every other category. and subcategory, including reading vocabulary, reading comprehension, mathematics problem-solving, mathematics procedures, language, spelling, study skills, science, social science, listening, using information and thinking skills.

Appendix C
[Findings of Fact and Conclusions of Law]

The SRO held that "[w]hile the program at Upton Lake appeared to address some of the student's organizational and social needs, it did not adequately address his deficits in math, written expression, and writing with special education instruction. The program at Upton Lake provided the student with accommodations, not specialized instructions in the main areas of need." SRO Decision at 9. Although "an assessment of educational progress is a type of judgment for which the district court should defer to the SRO's educational experience," the Court's decision is not "based solely on the record that was before the SRO." *M.S. v. Rd of Educ. of Yonkers,* 231 F.3d 96, 105 (2d. Cir. 2000). Here, the SRO did not have the benefit of viewing Anthony's final grades, particularly in math, or the results from the Stanford Achievement Test. He also could not consider Mrs. Fredericks' testimony concerning Anthony's improvement in his classroom behavior and interaction with the other students by the end of the year. Trial Tr. at 28.

The SRO recognized that Anthony improved in certain areas while at Upton Lake but he also found that Upton Lake did not adequately address Anthony's needs in areas such as handwriting and written expression. However,

"[t]he test for the parents' private placement is that it is appropriate, and not that it is perfect." *M.S. v. Rd. of Educ. of Yonkers,* 231 F.3d 96, 105 (2d. Cir. 2000) (quoting *Warren G. v. Cumberland County School District,* 190 F.3d 80, 84 (3d. Cir. 1999)). It is true that Upton Lake did not provide Anthony with an individual aide to work with Anthony or direct consultant teacher services.[1] Mrs. Fredericks only had the services of a parent volunteer for one-half hour per week but she worked with Anthony individually when possible and she also made certain testing and other academic modifications for Anthony to assist him in successfully completing his assignments. Trial Tr. at 25-27, 11-10 Tr. at 230-33. In addition, during the last half of the year Mrs. Fredericks did not need to work with Anthony on an individual basis as much as she did in the beginning of the year. Trial Tr. at 25.

A review of the objective facts from the administrative record and non-jury trial demonstrate that Anthony made meaningful academic and social progress at Upton Lake and

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[1] The parties dispute whether Upton Lake was required to provide Anthony these services at Upton Lake or only at a school within

received educational benefit. Accordingly, Plaintiffs' placement of Anthony at Upton Lake for the 2001-2002 school year was appropriate.

The School District claims that equitable circumstances do not justify an award of tuition reimbursement because Plaintiffs have always enrolled Anthony in private school and they "always intended to enroll [Anthony] in a private school, regardless of what program of services the District recommended." Def. Post-Trial Br., ¶ 40. The SR0 did not address whether equitable considerations would prohibit an award of tuition reimbursement. However, the IHO found that Mrs. Gelormino was sincere in her desire to place Anthony in public school and that the equities favored tuition reimbursement. The Court finds no evidence in the record to disturb the IHO's finding or to support the School District's contention that Plaintiffs only intended for Anthony to attend private school. The Court also notes that Anthony is currently attending public school in Hyde Park. Trial Tr. at 49.

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the district. Plaintiffs' second claim and the state court action addressed this issue.

Attorneys' fees and costs

Mr. Reisman submitted an affidavit detailing his lodestar computation to the Court in support of his application for counsel fees pursuant to 20 U.S.C. § 1415(i)(3)(B). Mr. Reisman began representing Plaintiffs in November 2001, immediately prior to the commencement of the impartial hearing. Mr. Reisman agreed to charge Plaintiffs $175.00 an hour for his services as compared to his customary fee of between $220.00 and $300.00. Ms. Joyce B. Berkowitz, Esq. has been Of Counsel to Mr. Reisman's law firm in this matter since July 2003 as she has considerably more experience in IDEA cases than Mr. Reisman. Ms. Berkowitz charged Plaintiffs a reduced hourly rate of $125.00 per hour. Mr. Reisman's legal fees and expenses incurred in this action total $34,567.00. Ms. Berkowitz's fee is $10,903.13. Thus, Mm. Reisman requests that the Court grant his application for counsel fees plus expenses in the amount of $45,560.13, or an amount deemed reasonable by the Court.

This Court agrees that both the lodestar and the hourly rates requested are reasonable. We are somewhat concerned about the total expenses of the litigation in light of the fact that as the sole monetary award Plaintiffs sought in the case

was $3,660.00 in tuition reimbursement. However, Plaintiffs are prevailing parties and are entitled to enforce their statutory rights.

Litigation is wasteful, and seems to be coming more so.

Conclusion

The Clerk shall file a judgment that Plaintiffs recover S3,660.00 in tuition reimbursement for the 2001-2002 school year with prejudgment interest at 9 percent from July 18, 2003 and $34,567.00 in attorneys' fees and litigation expenses.

SO ORDERED.

Dated: White Plains, New York
August 9, 2004

Charles L. Brieant, U.S.D.J.

Appendix D – State Review Officer Decision, Dated March 20, 2003 [Pages 75a – 99a]

The University of the State of New York

The State Education Department
State Review Officer

No. 02-024

Application of the BOARD OF EDUCATION OF THE HYDE PARK CENTRAL SCHOOL DISTRICT, for review of a determination of a hearing officer relating to the provision of educational services to a child with a disability

Appearances:
Donohue, Thomas, Auslander & Drohan, Esqs., attorneys for petitioner, Daniel Petigrow, Esq., of counsel

Mark I. Reisman, P.C., attorney for respondents, Mark I. Reisman, Esq., of counsel

DECISION

Petitioner, the Board of Education of the Hyde Park Central School District (district), appeals from an impartial hearing officer's decision ordering the district to provide or pay for special education services at the private school respondents' child attends, unless respondents agree to services at a different location. The district also appeals from

the hearing officer's order that it provide an individual aide to the student at the private school, if the private school becomes unable to provide the aide. Respondents cross-appeal from those portions of the impartial hearing officer's decision that denied their requests for reimbursement of their child's tuition for the 2001-02 school year, for an extended school year for their child, and for payment of their child's tuition at summer camp. Respondents also seek compensatory education. The appeal must be sustained in part. The cross-appeal must be dismissed.

Respondents have submitted academic reports from the 2000-01 and 2001-02 school years that were not part of the hearing record, and request that I accept such additional evidence. Documentary evidence not presented at a hearing may be considered in an appeal from a hearing officer's decision if such evidence was unavailable at the time of the hearing or when such evidence is necessary to enable me to render a decision (Application of a Child with a Disability, Appeal No. 98-55; Application of a Handicapped Child, 23 Ed. Dept. Rep 390). I will consider the academic report from the 2001-02 school year (Exhibit A to the Answer and Cross-Petition) because it was not available at the time of the

hearing. There is no evidence that the academic report from the preceding school year (Exhibit B to the Answer and Cross-Petition) was unavailable at the time of the hearing, and although I do not find it to be dispositive of the issues raised in this appeal and therefore necessary, I will nevertheless exercise my discretion and accept the document, in part because petitioner did not object to its submission (Application of a Child with a Disability, Appeal No. 91-25).

At the time of the hearing in the fall of 2001, respondents' son was ten years old and in the fourth grade of the Upton Lake Christian School (Upton Lake). Respondents unilaterally placed their son in Upton Lake, which has not been approved by the State Education Department as a private school with which school districts may contract to educate children with disabilities. The student had previously attended one private school for kindergarten and another private school, the Bishop Dunn Memorial School (Bishop Dunn), for the first through fourth grades. He repeated the fourth grade at Upton Lake by respondents' choice. The student was initially identified as learning disabled by petitioner's Committee on Special Education (CSE) in April 2000, but his classification was changed to other health impaired in January

2001. There is no dispute about his classification. In a prior proceeding, the parents' request for an award of tuition reimbursement for kindergarten through the third grade was denied because the request had not been made in a timely manner (Application of a Child with a Disability, Appeal No. 01-087).

In July 2000, the CSE recommended that the student receive five hours of direct consultant teacher services in a group of five for language arts and social studies, as well as skilled nursing services on an as needed basis and the support of an individual aide during the 2000-01 school year (Exhibits 6, 8, 10). It subsequently amended the student's individualized education program (IEP) for the 2000-01 school year to clarify that the specific services recommended for respondents' son were being offered if the student attended public school (Exhibits 11 and 12).

An occupational therapy evaluation conducted in February 2001 revealed weaknesses in the student's upper limb speed and coordination, visual memory and visual sequential memory. The evaluator recommended that the student receive group occupational therapy two times per week (Exhibit 17). On the Key Math Test-Revised, which was

administered in March 2001, the student achieved a total test score in the low average range, with deficits noted on the rational numbers, subtraction, mental computation, time and money, and problem solving subtests (Exhibit 27). About the same time, the student achieved a level three on the New York State English Language Arts examination. Students who achieve a score in the level three range have demonstrated an understanding of written and oral text with some attention to meaning beyond the literal level, and their writing is generally focused and organized (Exhibit 20).

In April and May 2001, the district administered the Behavior Assessment System for Children (BASC) to respondents' son. The results of that assessment, when compared to those of the BASC administered during the spring of 2000, indicated that the student's behavior had deteriorated both at home and in school. The evaluator recommended that the student receive individualized education at his instructional level. She noted that instruction at a fourth or fifth grade level, when his skills were at the second and third grade levels, would lead to frustration, minimal progress, and his continued withdrawal from the

academic environment including appropriate social interactions with peers (Exhibit 4, 18).

The student's second quarter report card from Bishop Dunn revealed that he was not graded in grammar, spelling, mathematics and social studies because of incomplete work (Exhibit I). In May 2001, the student's private therapist noted that the student was exhibiting depressive symptoms, lack of motivation, low frustration tolerance and difficulty with anger, and recommended that he be placed in a summer program to address his emotional and behavioral needs (Exhibit I).

A neuropsychological evaluation was conducted in May and June 2001. The student obtained a verbal IQ score of 100, a performance IQ score of 93 and a full scale IQ score of 96 on the Wechsler Intelligence Scale for Children - III (WISC-III). The evaluating psychologist noted that the student's scores on several subtests were lower than those he had obtained when tested in February 2000. The psychologist reported that the student's inattention and distraction had increased and that he was experiencing difficulty interpreting cues in social interaction. She recommended that he receive individual attention in a small class, and that he continue to

receive counseling. She also recommended psychiatric, vision and speech/language evaluations (Exhibit 23). In July 2001, the principal of Bishop Dunn asked the school district to provide an individual aide for the student (Exhibit 21).

On August 8, 2001, the CSE recommended that respondents' son be placed in a regular education fifth grade class in the district's Ralph R. Smith Elementary School, and that he receive direct consultant teacher services five times per week for 60 minutes for math and organizational skills, and a full time individual aide. It also recommended that the student receive 30 minutes of individual counseling per week, 30 minutes of group occupational therapy twice per week, skilled nursing services as needed, a behavior modification program and testing modifications (Exhibit 25). It did not recommend a 12-month school program for the student. The CSE indicated on the student's IEP for the 2001-02 school year that the parents would dually enroll their child at Bishop Dunn (Exhibit 25).

On August 10, 2001, the student's mother requested an impartial hearing because she was dissatisfied with the CSE's recommendation that her son receive special education services only if he attended the district's schools (Exhibit 26).

Appendix D
[State Review Officer Decision]

The impartial hearing was held over the course of five days during November and December 2001. The parents sought reimbursement of their child's tuition at Upton Lake and a 12-month program (Transcript pp. 7, 165). On the second day of hearing, the parents requested a 1:1 aide for their child during the course of the hearing (Transcript pp. 20, 21). In an interim decision dated November 15, 2001, the hearing officer denied the parents' request for an aide. During the course of the hearing, the district acknowledged that a regular education class was an inappropriate placement for the student, but continued to assert that the other components of the program recommended by the CSE were appropriate (Transcript pp. 121-127).

In a decision dated February 2, 2002, the hearing officer denied the parents' request for an award of tuition reimbursement for the 2001-02 school year upon a finding that the student had not made academic or social progress while attending Upton Lake. He further found that the student was not eligible for a 12-month educational program during the 2001-02 school year because there was no evidence that he would substantially regress without such a program, and the hearing officer denied respondents' request for

reimbursement for the cost of their son's summer camp. The hearing officer noted that there was no dispute about the appropriateness of the consultant teacher services, the individual aide and the related services of counseling and occupational therapy that the CSE had recommended for the student. He ordered the district to provide or pay for direct consultant teacher services and the related services of counseling and occupational therapy at Upton Lake, unless the parents consented to another location. The hearing officer also ordered the district to provide or pay for the cost of an individual aide at Upton Lake if the existing volunteer aide discontinued services. Finally, the hearing officer ordered the CSE to reconvene to find an appropriate placement for the student and to determine whether the student would require a program during the summer of 2002.

As a preliminary matter, I must first address petitioner's argument that respondents' disagreement with the proposed IEP should not have been adjudicated by an impartial hearing officer. The district contends that the hearing officer exceeded his jurisdiction because the state complaint procedure (8 NYCRR 200.5[k]), rather than an impartial hearing, is the exclusive process for challenging the

alleged denial of services to a student with a disability privately enrolled in a nonpublic school. In making this argument, petitioner fails to distinguish between federal and state law concerning the due process hearing rights for children with disabilities who are enrolled by their parents in private schools when a free appropriate education (FAPE) is not an issue. Relying upon 34 C.F.R. § 300.457, petitioner asserts that respondents had no right to invoke the impartial hearing provisions of either the Individuals with Disabilities Education Act (IDEA) or Article 89 of the New York Education Law. Petitioner's argument is without merit. Section 300.457 identifies procedures available to resolve "complaints" and reads as follows:

> (a) Due process inapplicable
> The procedures in Secs. 300.504-300.515 [including due process hearings] do not apply to complaints that an LEA [board of education] has failed to meet the requirements of Secs. 300.452-300.462, including the provision of services indicated on the child's services plan.
>
> (b) Due process applicable
> The procedures in Secs. 300.504-300.515 do apply to complaints that an LEA has failed to meet the requirements of Sec. 300.451, including the requirements of Secs. 300.530-300.543.

(c) State complaints
Complaints that an SEA or LEA has failed to meet the requirements of Secs. 300.451-300.462 may be filed under the procedures in Secs. 300.660-300.662.

A board of education must offer to provide a FAPE to each student with a disability residing in the school district who requires special education services (20 U.S.C. § 1412[a][1][A]; Education Law § 4402[2][a]). A board of education's alleged failure to offer a FAPE may be challenged in a proceeding brought pursuant to the due process provisions of the IDEA and Article 89 (20 U.S.C. § 1415[f][1]; Education Law § 4404[1]). Parents who choose to enroll their child in a private school, however, may not rely on the IDEA due process provisions to compel a board of education to provide special education to children so enrolled (34 C.F.R. § 300.457[a]), except insofar as the parents assert that the board failed to offer their child a FAPE (34 C.F.R. § 300.403).

Although federal law may not provide a basis for the hearing officer's exercise of jurisdiction in this matter, state law does. Federal regulations (34 C.F.R. §§ 300.450-

300.457), adopted in 1999, concerning the rights of private school children with disabilities, did not lead to any corresponding changes in New York State law or regulations. Section 4402(2) of the Education Law requires boards of education to provide special services or programs to students with disabilities. A student with a disability is defined as "a person under the age of twenty-one who is entitled to attend public schools pursuant to section thirty-two hundred two of [the Education Law] and who, because of mental, physical or emotional reasons can only receive appropriate educational opportunities from a program of special education" (Education Law § 4401[1]). If the recommendation of the CSE is not acceptable to the parents, the parents are entitled to the appointment of an impartial hearing officer to review that recommendation (Education Law § 4404[1], 8 NYCRR 200.5 [c]).

Additionally, section 3602-c of the Education Law requires the provision of special education services to students with disabilities who are enrolled by their parents in nonpublic schools provided that a request for such services is filed with the board of education on or before the first day of June preceding the school year for which the request is made

(Education Law § 3602-c[2]). The timeliness of respondents' request for services is not in dispute. Timely requests for services are to be reviewed by the CSE, and review of the CSE's recommendation is available by means of the impartial hearing process (Education Law §§ 3602-c[2] and 4404[1]). For students with disabilities enrolled in private schools, Section 3602-c incorporates by reference the Section 4404[1] due process hearing rights made available to students with disabilities in public school. Petitioner's CSE recommended services for respondents' son during the 2001-02 school year but did not indicate on the IEP the site of the services (Exhibit 25). The district indicated, however, in its opening argument that the student was to be placed in the district's elementary school (Transcript pp. 33-34). Respondents objected to the IEP prepared for their son based on the alleged failure of the CSE to recommend that the services be provided at the nonpublic school attended by their son (Exhibit 26). Because respondents sought review of the recommendation of the CSE, they were entitled to an impartial hearing to obtain that review (Education Law § 3602-c[2]), and the hearing officer properly exercised jurisdiction in this matter (Application of a Child with a Disability, Appeal No. 01-106; Appeal of a

Student with a Disability, 41 Ed Dept Rep ___, Decision No. 14630, dated August 23, 2001; Appeal of a Child Suspected of Having a Handicapping Condition, 30 Ed Dept Rep 448).

Petitioner further argues that the IDEA confers no individual entitlement to special education or related services upon students who are enrolled by their parents in nonpublic schools. In pertinent part, the IDEA provides that:

> To the extent consistent with the number and location of children with disabilities in the State who are enrolled by their parents in private elementary and secondary schools, provision is made for the participation of those children in the program assisted or carried out under this subchapter by providing for such children special education and related services in accordance with the following requirements... (20 U.S.C. § 1412 [a][10][A][i])

The federal regulation implementing this statutory provision specifies that:

> No private school child with a disability has an individual right to receive some or all of the special education and related services that the child would receive if enrolled in a public school. (34 C.F.R. § 300.454[a][1]).

Although boards of education are required by the IDEA to provide some special education services to some

students enrolled privately by their parents in nonpublic schools, no such students are individually entitled under the IDEA to any or all of the services they would receive if enrolled in a public school. The IDEA also authorizes the delivery of whatever special education services are to be provided to such students "on the premises of private, including parochial, schools, to the extent consistent with law" (20 U.S.C. § 1412[a][10][A][i][II]).

In contrast to the IDEA, New York State law does confer an individual entitlement to special education services to eligible students enrolled by their parents in nonpublic schools. Section 3602-c (2) of the Education Law requires boards of education, upon timely request by parents, to furnish appropriate special education programs to students with disabilities privately placed by their parents in nonpublic schools. While subdivision 9 of that section provides that such students "shall receive such services in regular classes of the public school and shall not be provided such services separately from pupils regularly attending the public schools," the New York State Court of Appeals has held that:

> "[t]he statute does not limit the right and responsibility of educational authorities in the first

> instance to make placements appropriate to the educational needs of each child, whether the child attends public or private school. Such placements may well be in regular public school classes and programs, in the interests of mainstreaming or otherwise [citation omitted], but that is not a matter of statutory compulsion under section 3602-c." (Bd. of Educ. v. Wieder, 72 N.Y. 174, 184 [1988]).

Petitioner correctly argues that Education Law § 3602-c does not mandate the location where services are to be provided to a student, but its contention that such services can be provided only in the regular classes of the public schools is clearly not supportable in light of Wieder, 72 N.Y. 174 (1988).

Having determined that dual enrollment services can be provided to students with disabilities either in the regular classes of the public schools or elsewhere, including at the nonpublic school the student attends, it is necessary to determine where the services required by respondents' son are to be provided. As noted above, there appears to be no dispute that the committee appropriately recommended that the student receive direct consultant teacher services, a full time individual aide, individual counseling, occupational therapy in a group, and skilled nursing services as needed. The district

argued that all of those services should be provided at the public school, while the hearing officer concluded that they should be provided at Upton Lake or at another location upon the consent of the parents.

Related services such as counseling and occupational therapy may be provided to a student in the classroom or in a separate location. The record indicates that individual counseling was recommended for the student because he is anxious, depressed, and withdrawn, and that he needs behavior modification (Exhibit 23). The student requires occupational therapy in a group to improve his visual motor integration skills and upper limb speed and coordination (Exhibit 17). There is nothing in the record to indicate that counseling and occupational therapy could not be appropriately provided to the student at a site other than Upton Lake.

The purpose of direct consultant teacher services is to develop the student's math and organizational skills to help him benefit from his regular education classes (Exhibit 25; 8 NYCRR 200.1[m][1]). In order to provide such services effectively, it is necessary to provide them in the student's regular class at the nonpublic school he attends. Similarly, the

services of a 1:1 full time aide can clearly be provided only at the nonpublic school. As the student's IEP does not specify the nature of the skilled nursing services recommended for him, it is not possible upon this record to determine the location at which they are to be provided.

In their cross-appeal, respondents seek tuition reimbursement for their son's attendance at Upton Lake during the 2000-01 school year. A board of education may be required to pay for educational services obtained for a student by his or her parent, if the services offered by the board of education were inadequate or inappropriate, the services selected by the parent were appropriate, and equitable considerations support the parent's claim (Burlington Sch. Comm. v. Dep't of Educ., 471 U.S. 359 [1985]). The failure of a parent to select a program known to be approved by the state in favor of an unapproved option is not itself a bar to reimbursement (Florence County Sch. Dist. Four v. Carter, 510 U.S. 7 [1993]). A board of education bears the burden of demonstrating the appropriateness of the program recommended by its CSE (M.S. v. Bd. of Educ. of the City Sch. Dist. of the City of Yonkers, 231 F.3d 96, 102 [2d Cir. 2000]; Application of a Child Suspected of Having a

Disability, Appeal No. 93-9; Application of a Child with a Handicapping Condition, Appeal No. 92-7; Application of a Handicapped Child, 22 Ed Dept Rep 487 [1983]).

To meet its burden of showing that it had offered to provide a free appropriate public education to an individual child, a board of education must show that it complied with the procedural requirements set forth in the IDEA, and that the recommended program developed through the IDEA's procedure is reasonably calculated to confer educational benefits (Bd. of Educ. v. Rowley, 458 U.S. 176, 206, 207 [1982]). In this instance, the district conceded that the regular education class placement recommended by its CSE did not appropriately address the student's needs and does not challenge in this appeal the hearing officer's finding that it failed to offer respondents' son a FAPE (Transcript p. 126). Therefore, petitioner failed to meet its burden of showing that the program it offered was appropriate.

Respondents bear the burden of proof with regard to the appropriateness of the services they selected for their son during the 2001-02 school year (Application of a Child with a Disability, Appeal No. 95-57; Application of the Bd. of Educ., Appeal No. 94-34; Application of a Child with a

Disability, Appeal No. 94-29). In order to meet that burden, they must show that the private school offered an educational program which met the student's special education needs (Burlington, 471 U.S. at 370; Application of a Child with a Disability, Appeal No. 94-29). The private school need not employ certified special education teachers, nor have its own IEP for the student (Application of a Child with a Disability, Appeal No. 94-20).

The record reveals that the student required primary special education instruction in math and writing, as well as ongoing assistance with transitions, attending and organization (Exhibits 4, 18, 19, 23, 27, K; Transcript pp. 50, 97, 98, 229). He also required counseling to improve his social skills and self-awareness, and related services to address his handwriting difficulties (Transcript pp. 64-68, 238). The student's teacher at Upton Lake detailed the modifications and supports that were provided to him at that school. She minimized the amount of material the student was required to copy from the chalkboard (Transcript p. 230). She also redirected him and allowed him to go to a quiet space in the classroom to complete tests (Transcript pp. 235, 254). His teacher indicated that she simplified test directions, and she

gave the student additional time to complete assignments and tests (Transcript pp. 250, 251, 254). She reported that, when possible, she worked with the student individually (Transcript p. 252).

The teacher acknowledged that she followed a regular education fourth grade curriculum (Transcript p. 229). The student's report cards revealed that he failed math for the first and second quarters of the 2001-02 school year. The student's second quarter report card indicated that skills such as "understands concepts" and "computes accurately" declined from satisfactory to needs improvement during the second marking period (Exhibit A of Cross-Petition).

The student's language arts grade improved. His report card indicated, however, that he continued to need improvement in written expression, including sentence structure, punctuation and capitalization. The student's ability to apply spelling skills in writing was unsatisfactory (Exhibit A of Cross-Petition). Although his teacher outlined modifications employed to reduce the burden of writing for the student, she confirmed that she did not have time to teach him mapping or outlining strategies (Transcript p. 253). His teacher described handwriting as one of the student's biggest

challenges. She opined that he would benefit from assistance in that area because she didn't have the time to work with him individually, nor did she have the expertise to address his specific motor weaknesses (Transcript p. 238).

The teacher reported that the student was not a behavior problem and that he had friends in school (Transcript pp. 255, 235). The evaluating psychiatrist reported that the student was doing poorly at school and continued to have difficulty with moodiness and peer relationships (Exhibits 28). The student's private psychologist reported that the student's depression and anxiety affected his academic functioning, his social interaction, and his behavior at home (Exhibit F). She opined that the program at Upton Lake was appropriate for the student; however, she acknowledged that she had not worked with the student on attending or academic based skills (Transcript pp. 203, 206, 213-216). She also testified that she did not have any direct contact with his teachers at Upton Lake, nor had she discussed strategies with them (Transcript pp. 217, 218). While the program at Upton Lake appeared to address some of the student's organizational and social needs, it did not adequately address his deficits in math, written expression, and handwriting with special

education instruction. The program at Upton Lake provided the student with accommodations, not specialized instruction in his main areas of need. Accordingly, respondents have not met their burden of proving that Upton Lake provided their son with appropriate services, and they are not entitled to tuition reimbursement. Because respondents are ineligible for tuition reimbursement due to their failure to establish the appropriateness of the program provided at the nonpublic school they selected for their son, it is unnecessary to address whether equitable considerations would prohibit such reimbursement (Application of the Bd. of Educ., Appeal No. 01-014; Application of the Bd. of Educ., Appeal No. 00-045).

The hearing officer denied respondents' request for a 12-month program, including the request for reimbursement for summer camp tuition, because he did not find evidence that the student would experience substantial regression in the absence of a 12-month program. Twelve-month programming is warranted when a student exhibits severe management needs, is multiply disabled, is recommended for home/hospital instruction, exhibits needs requiring placement in a seven-day residential facility, or exhibits the need for a 12-month special service or program to prevent substantial

regression (8 NYCRR 200.6[j]). Substantial regression is the "inability to maintain developmental levels due to a loss of skill or knowledge during the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives mastered at the end of the previous school year" (8 NYCRR 200.1[aaa]).

Respondents rely upon letters written by the student's private psychologist (Exhibits F, I). In May 2001, the psychologist recommended a summer camp, but she acknowledged that she did not know if the camp included an academic component (Transcript p. 208). In her December 2001 letter, the psychologist recommended a summer program in order to "prevent decompensation and loss of academic skills." She stated, however, that she was not familiar with the criteria for determining whether a student is eligible for a 12-month program (Transcript p. 220). The record does not show that the student would suffer substantial regression, and would therefore require a 12-month program. Consequently, the hearing officer properly denied respondents' request for a 12-month program.

In their cross-petition, respondents requested compensatory education. I find that the issue is beyond the scope of my review because it was not raised below (Application of a Child with a Disability, Appeal No. 01-010; Application of a Child with a Disability, Appeal No. 99-60).

THE APPEAL IS SUSTAINED TO THE EXTENT INDICATED.

THE CROSS-APPEAL IS DISMISSED.

IT IS ORDERED that the decision of the hearing officer is annulled insofar as it required that the related services of counseling and occupational therapy be provided at the nonpublic school attended by respondents' son or at another location upon consent of the parents.

Dated: Albany, New York
March 20, 2003

PAUL F. KELLY

Exhibit E – Finding of Fact and Decision of I.H.O. Eric Nachman, Esq., Dated February 11, 2002 [Pages 100a – 133a]

In the Matter of the Impartial Hearing
Brought upon the request of
Mr. & Ms. G., on behalf of their child
A., student #14927,

-against-

Hyde Park Central School District

Finding of Fact and Decision

Before:

Eric Nachman, Esq.
Impartial Hearing Officer
245 Rumsey Road
Suite 2K
Yonkers, New York 10701

The impartial hearing was initiated by a letter of request dated August 10, 2001 and received by the Hyde Park Central School District on August 14, 2001. On September 21, 2001, I was appointed to hear the matter of A. #1427, pursuant to the IDEA, 20 US Code Section 1415 (f) (1). The first day of hearing was he first day on November 1, 2001. A request the 45-day rule and for the of a management paraprofessional. A copy of those rulings are attached to this decision. The second day of hearing was held on November 9, 2001. The third day was held on November 29, 2001. The fourth day of hearing was held on December 7, 2001. The fifth and final day of hearing was held on December 13, 2001. I received the final transcript on December 24, 2001. I received the final brief Appended to the record is a list of persons in attendance and evidence submitted.

Background and Position of the Parties

A. is a ten-year-old other health impaired boy who was born in 1991 and will turn 11 on May 28th . He is currently attending a fourth grade class at the Upton Lake Christian School (Upton) . The Committee on Special Education (CSE) met in August 2001 to develop an

Individual Education Plan (IEP) for A. The CSE requested additional evaluations and recommended placement at the Ralph R. Smith Elementary School with related services, counseling, and occupational therapy. The program was a regular education program placement with a one-to-one aide and a direct consultant teacher for math and organizational deficits. The parent rejected the placement and placed A. at Upton.

It was the position of the district that the program recommended on August 8, 2001, was an appropriate district public school recommendation. It is now the position of the District that the program recommended on August 8, 2001, was not an appropriate recommendation. The related services continue to be appropriate. It is also their position that the private school placement at Upton was not an appropriate placement for A. In addition the District contends that equitable considerations favor a decision favorable to the District.

It is the position of Ms. G. that she did not desire to have her child placed in a private school. He was placed in the private school because the District has not appropriately provided for him; and that the private school placement was

appropriate. It's further her contention that the present IEP is not appropriate. It is her position that A. needs a small class setting with appropriate services added. It is her contention that there should be reimbursement for the tuition for the unilateral private school placement. In addition the related services should be provided for A. at the private school placement. She has also requested a 12-month program.

Case Presentation

MaryJane Montalto, school psychologist for the past seven years at the Hyde Park Central School District was called to testify. She holds a Doctor of Psychology degree from the State University at Albany, a Certificate of Advanced Study from the State University at Albany, a Masters of Education from Columbia University and a Bachelor of Arts from Marymount College.

Ms. Montalto testified that she conducted a three session, six to seven hour psychoeducational evaluation. The evaluation was performed in February of 2000 after an initial referral to the CSE. A. was tense and anxious at the initial testing. "He wasn't very enthusiastic about it at all. ... he reacted to challenging tasks with a lot of noncompliance."

(Tr. at 41) He needed encouragement, praise and the repetition of instructions to bring him to task.

Ms. Montalto observed A. at Bishop Dunn School in the spring of 2001. He was observed in a math class with 24 students and one teacher for about 35—minutes. "He was engaging in off-task behaviors that weren't disruptive. He also got up. He was sitting on the floor. Then when the teacher was going over math problems with the class he was playing with school supplies, so he wasn't engaged in that environment at all." When he was given the opportunity to participate he "was completely caught unaware that his turn was next and he couldn't answer the question." (Tr. at 43 - 44)

Ms. Montalto testified that she administered the Key Math assessment in March 2001. A. "was very resistant to coming to the testing situation. We use a lot of humor and a lot of verbal praise to get him to comply. He did engage and was very willing to work on easy problems. ... But as the problems became more difficult he sought to avoid the task ... He put his head down on the table. Wouldn't look at me. Would speak into the table and things like that." His overall testing "indicate that he may have some difficulty

concentrating because you need concentration and mental control to hold information in your memory and then manipulate it in some way." His scores were average but he showed weakness in writing. "He also demonstrated frustration and, ... inability on other challenging tasks and other academic areas." (Tr. at 47, 49 & 53) A. was also assessed using the Behavioral Assessment System for Children (BASC). A.'s "behaviors seem to have become more of a concern both at home and at school. And appear to be more severe and in more areas." (Tr. at 57 - 58)

Ms. Montalto was present at A.'s CSE meeting on August 8, 2001. She provided some of the counseling goals and the social/emotional goals on the IEP. She recommends that A. receive counseling because he "has a tendency to put himself down, especially when he feels he can't do something." In school he needed to be "pulled along, brought back to task. He often, when continually pressured, would blow up. So, many of his classmates were kind of like walking on eggs with him. And he had difficulties making good friends and keeping them. So he had some difficulties with social skills." He also needed to "work on decision making skills." (Tr. at 65 - 66 & 67)

She could not explain the difference between her recommendations and the final recommendations on the IEP. She testified that the IEP recommended a regular fifth grade class at the Ralph R. Smith and a duel enrollment at the Bishop Dunn School.

He would be receiving a "one-to-one T.A., full time, direct consultant teacher five times a week for 60 minutes for math and organizational skills, counseling one times 30 minutes per week individually. Occupational therapy two times 30 minutes per week in a group of five. Ten month program, transportation as per district policy. Skilled nursing services as needed. Behavior modifications program and testing modifications." She went on to state that the "curriculum would be modified so he could engage in it and the aide would help him with his, you know, keeping on task. So then possibly, yes, he could engage in a regular classroom." (Tr. at 79 & 90)

Mary Jo Perrino, resource room teacher for the past seven years at the Ralph R. Smith Elementary School, was called to testify. She has a Master's in special education and is going for a Master's in social work.

As a resource room teacher she takes a small group of

students and works with them on classroom assignments. "We use manipulatives, whatever we need to make sure they are understanding what the classroom teacher had just taught." We also modify the work to meet the students' needs. We work with the children's math, reading and writing areas. "I follow their IEP." (Tr. at 112 & 115)

Ms. Perrino has never worked with A. she did review his evaluations and current IEP. She finds that the program offered in the current IEP inappropriate. He should have been offered our "classroom of fourth and fifth graders. It's a self-contained classroom. There is nine students with a teaching assistant and the classroom teacher, a special ed. teacher, and it's a small class, it's a four-five and then he would have his one-to-one aide that in my opinion I thought that would be the better place for him." (Tr. at 123)

Daniel Petigrow, Esq., Attorney for the District stated, "Based upon the testimony offered by this witness as well as subsequent documents that have been introduced into evidence, it is pretty apparent at this point that the CSE meeting needs to be reconvened and reconvened soon in order to develop an appropriate in-district placement for this child." The District "is not conceding that any of the other services

that were recommended at that meeting a one-to-one aide, the occupational therapy services or the counseling are inappropriate for him." (Tr. at 125 - 127)

Ms. G., A.'s mother was called to testify. She testified that A. is a fourth grade student at Upton. He travels the ten-miles to school on the Hyde Park school bus. At three-years old, he was first diagnosed as a child who has Attention Deficit Hyperactivity Disorder by a child neuropsychologist. While attending the Wimpfheimer Nursery School in 1994 - 1995 he exhibited a "short attention span, hyperactivity, impulsivity, behavior outbursts, not able to sit still, fidgety." (Tr. at 139 - 140) Ms. G. did not find the District's kindergarten program appropriate for A. and enrolled him at the Randolph School a private non-state approved school. He then attended a regular education first grade class at Bishop Dunn in Newburgh. He stayed at Bishop Dunn through the fourth grade. There "were more behavior issues in the fourth grade to the point where he was suspended three times." (Tr. at 158) He was then enrolled at Upton.

Upton is a private non-State approved school in Clinton Corners, New York. A. is the 14th student in his class. "The teacher has been able to give him more individual

attention. There is less distraction, there is less noise. There has been no behavior issues whatsoever. They do have a volunteer parent that has agreed to come in because the teacher has asked if anyone can assist the classroom because she is having difficulty maintaining the class of 14 and giving him the special attention that he needs. She has modified the program to meet his needs. ... So I think it's been a great benefit to him. He is now socially interacting with his peers again ... Now he is back to a regular socialization, interacting with his peers age appropriately." (Tr. at 160 - 161 & 162)

Ms. G. testified that Dr. Nancy Baird recommended that A. should "continue with a 12-month program that handles his social skills, his self-esteem and academics, so he doesn't regress and he can continue to have a successful year when he continues the next grade, and he can learn to be more positive in his behavior and mannerisms when he reaches a level where he is frustrated." Ms. G. concluded by stating "I believe given his academic abilities, that he has the capability to be in a regular education classroom and the small classroom is absolutely necessary because of all the activity and the noise and the distractions that he is very sensitive to his environment. Again, having students that are more of his

typicality, more of his age, more of his social skills, so he can have age appropriate interaction with him, with them, is very beneficial -- would be very beneficial to him to help maintain a positive self-esteem." (Tr. at 165 - 166 & 169)

Under cross-examination Ms. G. testified that she "wasn't aware he [A.] needed special education services." The school does offer the "modifying the curriculum for him and helping him as teacher assistants, yes, they do." She also believes that A. continues to require a one-to-one aid. Upton provides a volunteer one-to-one aid, "I just know her by Mrs. Jordan, she is a volunteer mother right now and the teacher assists A. greatly throughout the day." (Tr. at 170 - 171) A. is not receiving any occupational therapy. He is also not receiving any school-based counseling services. She does agree that A. requires support services to address his weaknesses in math and in writing. Ms. G. testified that she would put *A.* in a District special education program, "if it was a program that met his needs and had a curriculum that was at his level with typical students, I have no problem with that. ... Typical students are students that can socially interact at his age level and his cognitive level. ... Being he is actually a fifth grader, there should be students that are able, to

function at a level of interests that concerns him." (Tr. at 176)

Dr. Nancy Baird, a licensed psychologist in the State of New York since 1998, was called to testify. She attended undergraduate school and received a BA in psychology from Randall Polk College. She then attended Pace University and received a doctorate in school and community psychology. She was in practice at St. Francis Hospital from 1992 through the present. She has been in private practice since June 2001. She specializes in children and adolescents, both emotional issues and family issues, stressors, and certainly children with ADHD, behavioral concerns and learning disabilities.

Dr. Baird started working with A. in April 2001. He is seen individually once a month and in a social skills group once a week. A. "was having some difficulties with anger management, some depressive quality, certainly some behavioral concerns in school and then also academic difficulties, frustrations with school, frustrations with dealing with how he felt about himself, self-esteem issues. ... he has ADHD and he also a depressive disorder which affects his academic learning and also has some learning disabilities." She does not "deal directly with the learning piece, that's not something I would do in therapy necessarily." (Tr. at 201 -

203 & 203)

Dr. Baird thinks "that he does need a small classroom setting. I think the classroom certainly needs to have some structure to it. He would not do well in an open kind of classroom. … also needs one-to-one attention, so I think the fact that he needs an aide to kind of help direct him and keep him on task and those pieces, and kind of be there when he reacts to kind of redirect him is an important piece. But definitely a small structured classroom." Dr. Braid testified that A.'s current program at Upton is appropriate. I think it's a small classroom, I think just the fact he is now starting to feel comfortable in a adjusting I think it's a good sign. I think that it can provide what he needs maybe with a little extra consultation in whatever, I certainly think it could meet his needs." (Tr. at 205 — 206 & 222)

She also testified that A. needed a summer program. "I think that often what happens for children who aren't kind of reminded of the skills that they need, they go through a regressive period during the summer. Children often have difficulty generalizing the skills they learned from one area from one environment to another, so I think the more you reinforce those skills, the greater the chance the child can

succeed." (Tr. at 223) "I think for his sake it certainly would be beneficial to continue some sort of structured experience that would not only expose him to expose him to ongoing academic support, but also ongoing social skills support. Camp Ramapo is one of the camps available that provides a milieu that promotes social skills, so it's something that is being addressed kind of throughout the whole program, and it also addresses children's emotional needs. So it works on issues like self—esteem and anger management." (Tr. At 208)

Linda Fredericks, A.'s fourth grade teacher at Upton, was called to testify. She graduated from Kent State University in 1972 with a dual major in elementary and secondary math education. She has been teaching for approximately 20 years and has taught at Upton for the past four years.

A. is in her 14—student general education class. The class follows the curriculum of a public school fourth grade class. The class has two 'classified' children and one child with reading problems. She understands that A. has fine motor coordination problems and writing motor skills, has Attention Deficit Disorder and emotional problems. She has modified her program for A. "I have tried to minimize

copying from the chalkboard or copying of material and enable him to get his answers in other ways than always written form. ... It's just getting it on paper, that's hard for him." In addition "there will be times I will pull him aside to work one—on—one or work at the small table in the back of the room with myself." When she had an aid in the class she had additional one—on—one time with A. "I was able, therefore, to encourage him, he can do it. ... I would say he is intelligent. He is very good with math and history once he gets down to it, he is especially fond of science." (Tr. at 230 — 231, 233 & 234)

A. entered the class as an obtrusive child. "he would be in and out of the classroom from the bathroom and whatever and didn't seem to know how to quietly come in and out. He didn't seem to have the social comfort that I would have hoped that he would have had. ... he has settled in quite nicely, basically is doing fairly well. ... he is sometimes — — what he is doing is distracting to me even but he will fiddle with things at his desk and play with his pens and just kind of fidget and always be fussing with something. A lot of times he is not attentive to what we are doing, and I have to remind him what he is supposed to be doing and get his

attention focused on where he should be. Other times he will raise his hand if he knows the answer when I call on him. Even if I give him a few moments to gather his thoughts, he will finally say "I forgot" and he won't be able to answer the question, I don't know what's going on there. But he does get excited sometimes and he does participate well. Other times he doesn't." (Tr. at 231 —232 & 235)

A. G. continues to have problems with changes in routine. Ms. Fredericks described a problem when a substitute covered the class. "I had left the class with his reading group having an assignment that did involve motor skills, which I had not adapted for his needs that day, and I just wasn't feeling well and it didn't occur to me to do that. So he was nervous and upset about how to do that assignment. I am assuming he was frustrated, it had to do with making up either a crossword puzzle, a word search or a set of flash cards for a set of vocabulary words. With his motor skills, that is a problem. Unfortunately he was not able to chose — not apparently to verbalize that to the woman in charge because she clarified to me later she had taken him out in the hallway, asked him what is wrong, tell me what the problem is and we will deal with it, and he just wouldn't tell her. And eventually

it was so contrary, she did have to send him over to the principal's office. Even when he got to the principal's office, he would not reveal what his real problem was. So he basically spent the rest of the afternoon in the principal's office, I guess." (Tr. at 256 — 257)

Ms. Fredericks is in favor of a summer program for A. "I can't see that would hurt him, no, I think that would probably be good for him to have some kind of reinforcement in the summer, although I wouldn't want him to do full-time school in the summer because I think he kind of needs a little bit of an emotional break from the pressure of academics, but some kind of reinforcement through the year would be excellent for him." (Tr. at 258)

Finding of Fact and Law

A Board of Education may be required to pay for educational services obtained for a child by the child's parents, if the services offered by the Board of Education were inadequate or inappropriate, the services selected by the parents were appropriate, and equitable consideration's support the parents' claim. (School Committee of Burlington v. Department of Education of Massachusetts, 471 U.S. 359

[1985])

The Board of Education bears the burden of demonstrating the appropriateness of the program recommended by its CSE (Matter of Handicapped Child, 22 Ed. Dept. Rep. 487; Application of a Child with a Handicapping Condition, Appeal No. 92-7; Application of a Child with a Disability, Appeal No. 93—9)." To meet its burden, the Board of Education must show that the recommended program is reasonably calculated to allow the child to receive educational benefits (Bd. of Ed. Hendrick Hudson CSD v. Rowley, 458 U.S. 176 [1982]), and that the recommended program is the least restrictive environment for the child (34 CFR 300.550 [b]; 8 NYCRR 200.6[a] [1]). An appropriate programs begins with begins with an IEP which accurately reflects the results of evaluations to identify the child's needs, provides for the use of special education services to address the child's special education needs, and establishes annual goals and short—term instructional objectives which are related to the child's educational deficits (Application of a Child with a Disability, Appeal No. 93—9; Application of a Child with a Disability, Appeal No. 93—12).

Appendix E
[Finding of Fact and Decision]

Appropriateness of the public school program:

Ms. Perrino found that the IEP offered by the district to be inappropriate. Mr. Petigrow, Esq. also agrees that the CSE must be reconvened "to develop an appropriate in—district placement for" A. I agree with both Ms. Perrino and Mr. Petigow and therefore find that the district has failed to offer A. a free and appropriate public education

I also agree with A.'s mother, Ms. Penrino, Ms. Montalto and Mr. Petigow that the related services of counseling, and occupational therapy are needed by A. to receive a free appropriate public education.

Appropriateness of the privateschool program

I do not find that A. is making academic or social progress at Upton. A.'s teacher testified that "A lot of times he is not attentive to what we are doing, and I have to remind him what he is supposed to be doing and get his attention focused ... he will raise his hand if he knows the answer when I call on him. ... he will finally say "I forgot" and he won't be able to answer the question." (Id) He only received one satisfactory on his Five Week Progress Report (Ex. J) at Upton. He received the satisfactory in spelling. He received

four needs improvement in English, bible, history and science. He had unsatisfactory grades in reading and math. He also continues to have problems with changes in routine and received a needs improvement in behavior. His first grading period report card (Ex. K) shows a continuing needs improvement in areas of math, language arts, penmanship, spiritual growth, personal growth, social growth and independent work. He received unsatisfactory grades in reading worksheet activities, applying spelling skills to writing, and work and study habits.

Dr. Baird, wrote in a letter dated December 3, 2001 (Ex. F) that "A.'s current level of depression and anxiety negatively affect his academic functioning, ... A.'s educational needs would best be met in a small structured classroom setting with an aid to assist him in completing tasks."

I agree with A.'s parents that A. needs a small structured classroom setting with an aid to assist him. A. does have an aid at Upton, "she is a volunteer mother right now." A. is in a small, only fourteen students, class setting. He is not showing progress in the Upton setting. I find that the parent's unilateral placement at Upton is not an appropriate placement.

Appendix E
[Finding of Fact and Decision]

If the private school program was appropriate would the equities favor reiinbursement?:

It has been the position of Ms. G. that she did not desire to have her child placed in a private school. I find that A. was placed in the private school because the District had not appropriately provided for him. I do find that Ms. A. was sincere in her desire to place A. in a public school setting. I do find that A. would have attended an appropriate September public school placement. She did not interfere with the CSE or IEP placement process. I do find that equities favored tuition reimbursement if I found or if the State Review Officer finds, if this case is appealed, that the parent's placement is appropriate.

Is a twelve—month program warranted?

Dr. Baird writes, "A. requires a twelve—month program to prevent decompensation and loss of academic skills." (Ex. F) She also testified that, "I think for his sake it certainly would be beneficial to continue some sort of structured experience that would not only expose him~ to

ongoing academic support, but also ongoing social skills support. ... Camp Ramapo is one of the camps available that provides a milieu that promotes social skills, so it's something that is being addressed kind of throughout the whole program, and it also addresses children's emotional needs. So it works on issues like self—esteem and anger management." (Tr. at 208)

Ms. Fredericks is also in favor of a summer program for A. She testified that, "I can't see
that would hurt him, no, I think that would probably be good for him to have some kind of reinforcement in the summer." (Tr. at 258)

It has been held that:

Twelve month programming is warranted when a CSE determines that a student needs a special service or structured learning environment in a twelve month program to prevent substantial regression (8 NYCRR 200.6[j]) . Substantial regression is "...a student's inability to maintain developmental levels due to a loss of skills or knowledge over the months of July and August of such severity as to require an inordinate period of review at the beginning of the school year to reestablish and maintain IEP goals and objectives

mastered at the end of the previous school year." (8 NYCRR 200. [nn]) . Petitioners' expert witness testified that the child should be in a twelve-month program to avoid the likelihood of substantial regression (Transcript p 655) . The school district offered no evidence to dispute the expert's contention the child would regress without a 12-month program. Rather, the CSE indicated that it would consider a summer program at the annual review. I find that the CSE may properly consider the necessity for an extended school year at the annual review. State Review Officer Appeal No. 00—029

The testimony that A. requires a 12—month program to prevent decompensation and loss of academic skills and that I think it would probably be good for him to have some kind of reinforcement in the summer does not amount to substantial regression. I find that without proof of substantial regression A. does not require a 12— month program. I find that proof of substantial regression was not presented and therefore a twelve-month program is not, at this time warranted.

Can and should related services be provided at Upton?

A.'s 2000—01 IEP (Ex. 11) specifically states:

"The IEP was amended to make clear that the program and services offered would be provided if the student attended Ralph R Smith." A.'s 2001—2002 IEP (Ex. 25) however states that "The parent will continue to dually enroll this child at Bishop Dunn." The new IEP eliminated the requirement that A. attend the district placement.

Ms. Montalto understood that A. was to receive a "one-to—one T.A., full time, direct consultant teacher five times a week for 60 minutes for math and organizational skills, counseling two times 30 minutes per week individually. Occupational therapy two times 30 minutes per week in a group of five. The CSE without explanation reduced counseling to one time a week.

Daniel Petigrow, Esq., did not concede that any of the other services that were recommended at that meeting a one—to—one aide, the occupational therapy services or the counseling are inappropriate for A. Ms. G. also agrees that A. requires support services to address his weaknesses I agree with Mr. Petigrow and Ms. Montalto and Ms. G. that A. requires services.

The Board of Education also appeals from the hearing

officer's decision requiring it to provide the child' s related services to her at the Ivy League School. The child was receiving one 45-- minute session of occupational therapy at petitioner's preschool program in the morning before class began at the Ivy League School. Four days per week, she was transported by her mother from the Ivy League School at 2:30 p.m. to petitioner's Accomsett Elementary School for three 30—minute sessions of speech therapy and one 30— minute session of physical therapy. Consequently, the child was not receiving all of the related services to which she was entitled under her IEP. I agree with the Board of Education that as a general proposition a school district is not obliged to provide special education services at the site of a private school selected by a child's parent (Bd. of Ed. v. Weider et al., 72 NY 2d 174 [1988]). However, petitioner had an obligation to provide this child with a free appropriate public education, including related services, which it failed to meet. I find that the hearing officer did not exceed his discretion in providing redress to respondents by requiring that their child's related services be provided at the Ivy League School. State Review Officer Appeal No. 00-023

I found that the district did not provide A. with a free

appropriate public education. The district and the parents agreed that A. required related services. The district removed the district placement requirement (Ex. 11) from the current IEP (Ex. 25) . I do find that A. requires related services and those related services shall be provided at Upton or such other location closer to the District upon consent of the parents. The District will be responsible for the cost of the one—to—One T.A. if Upton can no longer provide a volunteer one—to—one T.A.

ORDER

1. I hereby deny parent's request for tuition reimbursement at Upton Lake Christian School.

2. I hereby deny parent's request for a 12-month program.

3.. I hereby deny parent's request for payment at a summer camp program at Camp Ramapo or Camp Northwood.

4. I hereby order the district to provide the related services or pay for the related services of direct consultant teacher five times a week for 60 minutes for math and organizational skills, counseling two times 30

minutes per week individually.
Occupational therapy two times 30 minutes per week in a group of no more then five for the rest of the 200l—2002 school year.

5. I hereby order the related services set forth in order 4 above be provided at Upton or such other location closer to the District upon consent of the parents for the rest of the 2001—2002 school year.

6. I hereby order the district to provide or pay for cost of the one—to-one T.A. at Upton if Upton can no longer provide a volunteer one—to-one T.A. for the rest of the 2001—2002 school year.

7. I hereby order the CSE to immediately reconvene to find an appropriate placement and program for A.

8. I hereby order the CSE to meet with enough lead time to determine if a summer program for 2002 is appropriate for A.

Eric Nachman, Esq., I.H.O.
February 11, 2002

Persons in attendance:

November 1, 2001

Ms. D.C.	Parent
Mark Reisman, Esq.	Attorney for the Parent Castro & Remer, P.C. 30 State Street Suite 100 Ossining, NY 10562
Rose Marie Santore	Director of Pupil personnel Services
Daniel Petigrow, Esq.	Attorney for the District Donoghue, Thomas, Auslander & Drohan, Esq. 2517 Route 52 Hopewell Junction, NY 12533

November 9, 2001

Mark Reisman, Esq.	Attorney for the parent Castro & Remer, P.C. 30 State Street Suite 100 Ossining, NY 10562
Rose Marie Santore	Director of Pupil personnel Services

Daniel Petigrow, Esq.	Attorney for the District Donoghue, Thomas, Auslander & Drohan, Esq. 2517 Route 52 Hopewell Junction, NY 12533

November 29, 2001

Ms. D.C.	Parent
Mark Reisman, Esq.	Attorney for the Parent Castro & iRerner, P.C. 30 State Street Suite 100 Ossining, NY 10562
Rose Marie Santore	Director of Pupil Personnel Services
Daniel Petigrow, Esq.	Attorney for the District Donoghue, Thomas, Auslander & Drohan, Esq. 2517 Route 52 Hopewell Junction, NY 12533
MaryJane Montalto	School psychologist HPCSD

December 7, 2001

Ms. D.G.	Parent
Mark Reisman, Esq.	Attorney for the parent

Castro & Remer, P.C.
30 State Street
Suite 100
Ossining, NY 10562

Daniel Petigrow, Esq. — Attorney for the District
Donoghue, Thomas,
Auslander & Drohan, Esq.
2517 Route 52
Hopewell Junction, NY
12533

District

Exhibit No.	Description
1	10/22/99 letter from D.C. to Dr. Naiman, one page
2	11/8/00 letter from Dr. Nairnan to D.G.
3	Five page document consisting of a 1/3/00 notice of initial referral evaluation and an excerpt of due process rights
4	3/12/00 psychoeducational evaluation, nine pages
5	2/11/00 social history, four pages
6	1999-2000 IEP, six pages
7	One page attendance sheet from CSE meeting held on 7/18/00

Appendix E
[Finding of Fact and Decision]

8	Handwritten note dated 7/18/00
9	One page handwritten note
10	Consent for special education placement form dated 7/18/00, one page
11.	2000-2001 IEP, six pages
12	Two page document titled Committee Minutes, indicating a CSE date of 10/5/00
13	One page letter from D.C. dated 11/9/00, requesting an impartial hearing
14	11/17/00 letter from Janice Griffin, one page
15	2000-2001 IEP, eleven pages 6
16	3/21/01 letter to Mr. and. Ms. G. from Lou Valesey
17	Two page occupational therapy evaluation dated 2/1/01
18	Behavior assessment report dated 6/18/01, four pages
19	Three page document consisting of a 5/15/01 letter from Mr. Del Viscio and results of the Iowa Test of Basic Skills
20	New York State English language arts test student

performance report for A., one page

21 One page 7/9/01 letter from James Del Viscio to the Hyde Park School District

22 Two page 7/18/01 letter from Rachel Asher, Esquire, to James P. Drohan

23 Dr. Miriam B. Lacher's neuropsychological evaluation, 20 page document

24 24 page document consisting of consent for special education placement and consent to evaluate forms, attendance sheet of CSE meeting held 8/8/01, handwritten notes, and an IEP collection packet

25 2001-2002 IEP, twelve pages

26 Two page 8/10/01 letter from D.C. to Mr. David Burpee

27 Psycho-Educational Assessment dated 3/9/01, 6 pages

28 Psychiatric Evaluation dated 11/26/01, 3 pages

29 TWO-PAGE EYE EXAM DOCUMENT FROM DAWN RUSH, MAILED ON 11/16/0 1

30 SPEECH AND LANGUAGE EVALUATION, THREE PAGES, FROM AMY KUNKEL

Appendix E
[Finding of Fact and Decision]

Parents'

Exhibit No.	Description
A	ONE-PAGE LETTER DATED 10/5/95 FROM WIMPFHEIMER NURSERY SCHOOL
B	LETTER DATED 3/96 FROM HYDE PARK CENTRAL SCHOOL DISTRICT, TEN PAGES
C	TWO-PAGE CHILD BEHAVIOR CHECKLIST
D	FOUR-PAGE NOTES DATED 10/97
E	REPORT FROM RANDOLPH SCHOOL, KINDERGARTEN PROGRAM
F	ONE-PAGE LETTER FROM DR. BAIRD DATED 12/3/01
G	CV OF DR. BAIRD, FOUR PAGES
H	TWO-PAGE LETTER DATED 7/18/01 FROM RACHEL ASHER
I	LETTER FROM DR. BAIRD DATED 5/1/01 WITH TWO-PAGE ATTACHMENT; THREE PAGES TOTAL
J	STUDENT FIVE-WEEK PROGRESS REPORT DATED OCTOBER 10, 2001, ONE PAGE

K TWO-PAGE ELEMENTARY PROGRESS REPORT CARD FROM UPTON LAKE CHRISTIAN SCHOOL, '01-'02, TWO PAGES, FIRST QUARTER

L UPTON LAKE CHRISTIAN SCHOOL DOCUMENT OF TUITION COSTS INVOICE DATED DECEMBER 12, 2001

M CAMP NORTHWOOD DOCUMENT DATED DECEMBER 3, 2001, EIGHT PAGES

FILED
DEC 27 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

(3)

No. 06-580

IN THE

Supreme Court of the United States

BOARD OF EDUCATION OF THE HYDE PARK CENTRAL SCHOOL DISTRICT,

Petitioner,

v.

FRANK G. AND DIANNE G., Parents of a Disabled Student, ANTHONY G.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

RESPONDENTS' BRIEF IN OPPOSITION

JOYCE B. BERKOWITZ
6605 Pittsford-Palmyra Road
Suite E-10
Fairport, New York 14450
(585) 421-9094

MARK I. REISMAN
Counsel of Record
MARK I. REISMAN, P.C.
The Hill Building
30 State Street - Suite 102
Ossining, New York 10562
(914) 944-4087

BONNIE I. ROBIN-VERGEER
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Counsel for Respondents

December 2006

QUESTION PRESENTED

Whether the Individuals with Disabilities Education Act permits a court to order, as "appropriate" relief, that public school authorities reimburse parents for private school tuition for a disabled child who had never been enrolled in public school and thus had not "previously received special education and related services under the authority of a public agency," 20 U.S.C. § 1412(a)(10)(C)(ii), where the public school district conceded that it had not made a free appropriate public education available to the child, and the child's private school placement was appropriate under the Act.

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RESPONDENTS' BRIEF IN OPPOSITION

The petitioner, the Board of Education of the Hyde Park Central School District ("school district"), contends that a phrase in a provision of the Individuals with Disabilities Education Act ("IDEA"), added in the 1997 amendments, absolutely bars reimbursement for private school tuition to parents of a disabled child if the parents "have not first tried [a] public school special education placement." Pet. 3. The U.S. Court of Appeals for the Second Circuit unanimously rejected this contention and correctly held that the provision at issue, 20 U.S.C. § 1412(a)(10)(C)(ii), does not limit tuition reimbursement to parents of a child who had previously enrolled in public school or received special education and related services under the school district's authority. In so holding, the court explained that petitioner's construction of the Act conflicts with the overall statutory scheme and purpose: to make available to all disabled children a free and appropriate public education.

Case law addressing the question presented is sparse and undeveloped, and there is no conflict among the courts of appeals. The only other court of appeals to have addressed the question whether § 1412(a)(10)(C)(ii) prohibits tuition reimbursement for parents of a child who had not previously been enrolled in public school agrees with the Second Circuit's view that the IDEA does not bar reimbursement in that circumstance. *See M.M. ex rel. C.M. v. Sch. Bd. of Miami-Dade County*, 437 F.3d 1085, 1098-1100 (11th Cir. 2006). The First Circuit's decision in *Greenland School District v. Amy N*, 358 F.3d 150 (1st Cir. 2004), upon which petitioner relies, did not decide the question presented and is factually distinguishable; indeed, the Second Circuit in this case discussed *Greenland* at length and agreed with its disposition. Pet. App. 49a-54a.

The court of appeals' decision here is faithful to this Court's decisions in *School Committee of Burlington v.*

Department of Education, 471 U.S. 359 (1985), and *Florence County School District v. Carter*, 510 U.S. 7 (1993), both of which upheld the authority of a court to order tuition reimbursement under the IDEA for parents who unilaterally placed their disabled child in private school when the public school authorities failed to offer the child a free appropriate education and when the parents' private school placement was proper under the Act. Finally, the Second Circuit's interpretation of the contested language is shared by the United States Department of Education, the views of which are entitled to deference. There is no basis for further review here.

STATEMENT

It is established that during the 2001-02 school year, the public school district failed to make available to Anthony G. a free appropriate public education, that his private school placement was proper under the IDEA, and that the equities favor reimbursing his parents for the private school tuition. The question presented here is whether, despite these undisputed facts, the IDEA bars tuition reimbursement to Anthony's parents solely because Anthony had not previously received special education and related services under a public agency's authority. To understand why the Second Circuit's decision rejecting that position is correct and not worthy of review, it is necessary, first, to describe the IDEA and then to proceed to the facts of the case and the decision below.

1. The Statutory Scheme. Congress enacted the IDEA "to ensure that all children with disabilities have available to them a free appropriate public education that emphasizes special education and related services designed to meet their unique needs." 20 U.S.C. § 1400(d)(1)(A). A free appropriate public education, or "FAPE," means "special education and related services," provided at public expense, that are tailored to the unique needs of the disabled child by means of an "individualized educational program" ("IEP"). *See id.*

§ 1401(9), (14), (26), (29) (defining these statutory terms); *id.* § 1414(d) (specifying IEP requirements); *see Bd. of Educ. v. Rowley*, 458 U.S. 176, 181-82 (1982). To accomplish its objectives, the IDEA provides federal financial assistance to states that submit plans to the Department of Education implementing the IDEA's policies and procedures, including the requirement that states make "a free appropriate public education . . . available to all children with disabilities residing in the State." 20 U.S.C. § 1412(a)(1). School districts unable to provide a child a FAPE in a public school setting may place a child in, or refer a child to, a private school or facility—at no cost to the parents—as a means of carrying out the IDEA's requirements. *Id.* § 1412(a)(10)(B)(i). Underscoring its intent that *all* disabled children be offered a FAPE, Congress amended the IDEA in 1997 to clarify that the states' obligation to identify, locate, and evaluate all children with disabilities residing within their borders (the "child find" obligation) includes "children with disabilities attending private schools." Pub. L. 105-17, § 101 (adding IDEA § 612(a)(3)(A)), 111 Stat. 37, 61 (1997), *codified at* 20 U.S.C. § 1412(a)(3)(A).

The IDEA affords comprehensive procedural protections, including the right to an impartial due process hearing and an administrative appeal, to parents dissatisfied with a school district's evaluation or placement of their child or with the provision of a FAPE. 20 U.S.C. § 1415(f) & (g). Aggrieved parties may challenge administrative decisions in state or federal court. *Id.* § 1415(i)(2). In any such action, the court "shall grant such relief as the court determines is appropriate." *Id.* § 1415(i)(2)(C)(iii).

The 1997 IDEA amendments, Pub. L. 105-17, 111 Stat. 37, which made numerous changes to the Act, were enacted against the backdrop of key decisions by this Court regarding the power of courts to order private school tuition reimbursement for parents who unilaterally placed their child in private school

when the public school district had failed to make available to the child a free appropriate public education.

In 1985, this Court held in *School Committee of Burlington v. Department of Education*, 471 U.S. 359 (1985), that 20 U.S.C. § 1415(e)(2) of the Education of the Handicapped Act (the predecessor to the IDEA)—a provision identical to the current 20 U.S.C. § 1415(i)(2)(C)—"confer[red] broad discretion on the court" to order school authorities to reimburse parents for private school tuition for their child if the court ultimately determined that such placement, rather than a proposed IEP, was proper under the Act. *Burlington*, 471 U.S. at 369. As the Court reasoned: "In a case where a court determines that a private placement desired by the parents was proper under the Act and that an IEP calling for placement in a public school was inappropriate, it seems clear beyond cavil that 'appropriate' relief would include a prospective injunction directing the school officials to develop and implement at public expense an IEP placing the child in a private school." *Id.* at 370.

Observing, however, that a final decision on the appropriateness of an IEP often comes long after the school term has ended, the Court recognized that, in the meantime, "parents who disagree with the proposed IEP are faced with a choice: go along with the IEP to the detriment of their child if it turns out to be inappropriate or pay for what they consider to be the appropriate placement." *Id.* "If they choose the latter course," as "conscientious parents who have adequate means . . . normally would," *id.*, "it would be an empty victory to have a court tell them several years later that they were right but that these expenditures could not in a proper case be reimbursed by the school officials." *Id.* Such a result would deny "the child's right to a *free* appropriate public education." *Id.* (emphasis in original). The Court pointed out that parents who unilaterally change their child's placement during the pendency of review proceedings, without school officials' consent, "do so at their

own financial risk" because, if the courts ultimately determine that the IEP was appropriate, the parents would be barred from obtaining reimbursement. *Id.* at 373-74.

In *Florence County School District Four v. Carter*, 510 U.S. 7 (1993), this Court held that parents were not barred from reimbursement because the private school in which they unilaterally placed their child did not meet the IDEA's definition of "free appropriate public education," while reaffirming *Burlington*'s recognition of a court's broad authority to order school officials to reimburse parents for private school expenses if the court determines that such private school placement, rather than a proposed IEP, is proper under the Act. *Id.* at 12-14. The Court admonished that public school officials who wish to avoid reimbursing parents for private education "can do one of two things: give the child a free appropriate public education in a public setting, or place the child in an appropriate private setting of the State's choice." *Id.* at 15. It emphasized, however, that parents who unilaterally change their child's placement are entitled to reimbursement only if a federal court concludes both that the public placement violated IDEA and that the private school placement was appropriate under the Act. Equitable considerations, the Court reminded, bear on the court's choice of relief. *Id.* at 15-16.

The 1997 amendments to the IDEA did not alter the statute's grant of authority to a court to award "such relief as the court determines is appropriate," 20 U.S.C. § 1415(i)(2)(C)(iii), as construed by this Court in *Burlington* and *Carter*. Congress added a provision, however, concerning payment for private school education, *id.* § 1412(a)(10)(C)(ii), which contains the language on which petitioner relies to avoid its obligation to reimburse respondents. To understand that provision, it should be quoted in context:

(C) Payment for education of children enrolled in private schools without consent of or referral by the public agency

(i) In general

Subject to subparagraph (A), this subchapter does not require a local educational agency to pay for the cost of education, including special education and related services, of a child with a disability at a private school or facility if that agency made a free appropriate public education available to the child and the parents elected to place the child in such private school or facility.

(ii) Reimbursement for private school placement

If the parents of a child with a disability, *who previously received special education and related services under the authority of a public agency,* enroll the child in a private elementary school or secondary school without the consent of or referral by the public agency, a court or a hearing officer may require the agency to reimburse the parents for the cost of that enrollment if the court or hearing officer finds that the agency had not made a free appropriate public education available to the child in a timely manner prior to that enrollment.

(iii) Limitation on reimbursement

The cost of reimbursement described in clause (ii) may be reduced or denied—

(I) if—

(aa) at the most recent IEP meeting that the parents attended prior to removal

> of the child from the public school, the parents did not inform the IEP Team that they were rejecting the placement proposed by the public agency to provide a free appropriate public education to their child, including stating their concerns and their intent to enroll their child in a private school at public expense; or
>
> (bb) 10 business days (including any holidays that occur on a business day) prior to the removal of the child from the public school, the parents did not give written notice to the public agency of the information described in item (aa);
>
> (II) if, prior to the parents' removal of the child from the public school, the public agency informed the parents, through the notice requirements described in section 1415(b)(3) of this title, of its intent to evaluate the child (including a statement of the purpose of the evaluation that was appropriate and reasonable), but the parents did not make the child available for such evaluation; or
>
> (III) upon a judicial finding of unreasonableness with respect to actions taken by the parents.
>
> * * *

20 U.S.C. § 1412(a)(10)(C) (emphasis added). As discussed below, the court of appeals recognized that the disputed provision, *id.* § 1412(a)(10)(C)(ii), does not say that tuition reimbursement is available *only* to parents of a disabled child who had previously received special education and related services from a public agency. Pet. App. 31-32a. The United

States Department of Education, which has rulemaking authority under the IDEA, agrees that the disputed provision is silent regarding a court's authority to order tuition reimbursement for children who have *not* previously received such public services, and that courts retain authority to order such reimbursement under 20 U.S.C. § 1415(i)(2)(C)(iii).

2. Factual Background. The facts as this case reaches this Court are now undisputed. The case arises out of the efforts of parents Frank and Dianne G. to obtain reimbursement for the private school tuition they incurred during the 2001-02 school year as a result of their local school district's failure to provide their child, Anthony G., a free appropriate public education. Since the age of three, Anthony has been diagnosed with Attention Deficit Hyperactivity Disorder. He attended private schools from 1997 to 2001, through fourth grade. As Anthony progressed from first to fourth grade, his performance worsened. In April 2000, in response to notification from Anthony's parents, the school district's Committee on Special Education ("CSE") classified Anthony as learning disabled under the IDEA, as well as under New York law. Pet. App. 6a. The CSE later changed Anthony's classification to "other health impaired." Pet. App. 57a.

Early in 2001, the school district began evaluating Anthony. An occupational therapy evaluation revealed that Anthony suffered deficits in visual memory and sequential memory skills. A math assessment exposed severe deficiencies in Anthony's subtraction and problem solving skills and below average skills in other areas. During an in-class behavior assessment, Anthony was observed engaging in substantial off-task behavior. Pet. App. 6a-7a. Dr. Miriam Lacher conducted an independent neuropsychological evaluation during the spring and early summer of 2001. She recommended, among other things, that Anthony receive individualized attention and a relatively small class size and that he be dropped down to a class size of 12, with an aide to assist him. *Id.* at 7a.

On August 8, 2001, the CSE reviewed Anthony's performance from the previous year and developed an IEP for the 2001-02 school year. The CSE recommended that Anthony be placed in a regular education class of 26 to 30 students at the Ralph R. Smith Elementary School ("Smith School"), a public school within the school district, and that he receive additional services to be provided at the school. Pet. App. 8a. Anthony's parents objected to the placement and requested an impartial due process hearing to reconsider it. In her letter to the school district, Anthony's mother emphasized that the Smith School's large class size would not be appropriate for Anthony, a position consistent with recommendations by Anthony's teachers and therapists. *Id.* at 8a-9a. An administrative hearing was held before an Impartial Hearing Officer ("IHO") in November and December 2001. In the meantime, Anthony's parents withdrew him from the private school he had been attending and enrolled him at the Upton Lake Christian School, also a private school. At Upton Lake, Anthony repeated fourth grade in a class of 14 students. *Id.* at 9a. Anthony's parents sought reimbursement at the hearing for the tuition they paid that school for the 2001-02 school year.

During the hearing before the IHO, the school district conceded that the public school placement offered to Anthony at the Smith School was not appropriate, and the IHO agreed with that concession. Pet. App. 9a, 11a; *see also id.* at 118a, 124a-125a (IHO decision); *id.* at 93a (State Review Officer ("SRO") decision). That left the school district with the defense that the Upton Lake placement was likewise inappropriate and that, therefore, the district should not be required to reimburse Anthony's parents for tuition costs. Although the IHO and, on administrative review, the SRO, denied reimbursement because they found the private school placement inappropriate, *id.* at 10a-12a, the district court, with the benefit of additional evidence adduced at trial regarding significant progress made by Anthony at Upton Lake, found

that the school was an appropriate placement for him under the IDEA. *Id.* at 12a-14a; *see also id.* at 68a-72a. The court of appeals affirmed the district court in this respect, *id.* at 21a-27a, and the appropriateness of Anthony's private school placement is not an issue before this Court. Relying on the IHO's determination that Anthony's parents were sincere in their desire to place Anthony in public school and that the equities favored tuition reimbursement, *id.* at 72a; *see id.* at 120a (IHO decision), the district court awarded the parents reimbursement in the amount of $3,660, as well as attorneys' fees. *Id.* at 14a, 74a. The court of appeals affirmed. *Id.* at 5a.

Not until the school district's reply brief in the court of appeals did it argue that the IDEA, as amended in 1997, provided it an "absolute defense" by purportedly barring tuition reimbursement to any child who had not "previously received special education and related services under the authority of a public agency," citing 20 U.S.C. § 1412(a)(10)(C)(ii).

3. The Court of Appeals' Decision. The Second Circuit rejected the school district's argument that the disputed phrase bars private school reimbursement where the child has not previously received special education and related services under the authority of a public agency.

First, the court of appeals rejected the school district's contention that the plain language of 20 U.S.C. § 1412(a)(10)(C)(ii) prohibits reimbursement, noting that the provision "does not say that tuition reimbursement is *only* available to parents whose child had previously received special education and related services from a public agency, nor does it say that tuition reimbursement is not available to parents whose child had not previously received special education and related services." Pet. App. 31a-32a (emphasis in original). The court emphasized that 20 U.S.C. § 1415(i)(2)(C), interpreted by this Court in *Burlington* to authorize the equitable remedy of tuition reimbursement to parents who

enrolled their disabled child in private school while they successfully litigated the issue of the inappropriateness of his public placement, had gone unchanged by Congress in its 1997 revision of the statute. Pet App. 31a-35a. The court found Congress's re-adoption of the provision significant because of the presumption that Congress intends to adopt this Court's constructions of a statutory provision that Congress has included in a re-enactment. *Id.* at 35a. The court also pointed out that the school district's reading of § 1412(a)(10)(C)(ii) as restricting reimbursement to parents whose child had previously received public special education and related services "was inconsistent with the clear implication of § 1412(a)(10)(C)(i)," Pet. App. 35a, which provides that school authorities need not pay the cost of education at a private school or facility "if that agency made a free appropriate public education available to the child." § 1412(a)(10)(C)(i). That provision, the court of appeals reasoned, implied that reimbursement *is* potentially available where, as here, the opposite has occurred, and the school district has *not* made a FAPE available to the child. Pet. App. 36a.

The court of appeals concluded that petitioner's proffered interpretation of the disputed language was contrary to the express purpose of the IDEA, which was to ensure that a FAPE is available to *all* children with disabilities, and that nothing in the 1997 amendments or their legislative history suggested that Congress sought to alter prior law to constrain the power of a district court to award reimbursement for a private placement where a FAPE had not been provided to the child. Pet. App. 39a-40a. Noting that this Court had found that the statute "was intended to give handicapped children both an appropriate education and a free one" and that the Act should "not be interpreted to defeat one or the other of those objectives," the Second Circuit concluded that the construction urged by the school district "would defeat both purposes of the IDEA." Pet. App. 41a (quoting *Burlington*, 471 U.S. at 372, and *Carter*, 510

U.S. at 12-13). It found unenlightening the brief passage in the House Committee Report, H.R. Rep. No. 105-95, at 93 (1997), *reprinted in* 1997 U.S.C.C.A.N. 78, 90, relied on by petitioner, *see* Pet. 7-8, 10, as it was merely an "awkward paraphrase" of the statutory language and did not address the availability of reimbursement when public special education and related services had not previously been provided. Pet. App. 46a.

Finally, the Second Circuit explained that the school district's interpretation of 20 U.S.C. § 1412(a)(10)(C)(ii) would produce absurd results, such as preventing children who had been provided with inadequate IEPs from receiving a free appropriate public education if their disabilities were detected before they reached school age. Pet. App. 41a. It would also place the parents of children with disabilities "in the untenable position of acquiescing to an inappropriate placement in order to preserve their right to seek reimbursement from the public agency that devised the inappropriate placement." *Id.* at 41a-42a. Yet, according to the school district, that is exactly what Anthony's parents were required to do to be reimbursed. The court of appeals correctly ruled that "[s]uch a 'first bite' at failure is not required by the IDEA." *Id.* at 42a.

REASONS FOR DENYING THE WRIT

It is now established that (1) the school district denied Anthony G. a free appropriate public education; (2) Anthony G.'s private school placement was appropriate under the IDEA; and (3) the equities favored reimbursing his parents for private school tuition for the 2001-02 school year. The only question is whether the disputed phrase in 20 U.S.C. § 1412(a)(10)(C)(ii) invariably prohibits a court from ordering reimbursement—even when the court believes such an award to be "appropriate" under 20 U.S.C. § 1415(i)(2)(C)(iii)—when parents refuse to experiment with their child's welfare and give a concededly improper public school placement "a

try." Pet. 13. For the reasons discussed below, that question does not merit further review.

REVIEW SHOULD BE DENIED BECAUSE CASE LAW ADDRESSING THE QUESTION PRESENTED IS SPARSE AND UNDEVELOPED, THERE IS NO SPLIT IN THE CIRCUITS, AND THE COURT OF APPEALS' DECISION IS CONSISTENT WITH THIS COURT'S CASE LAW.

I. Only two other courts of appeals have considered whether the disputed phrase in 20 U.S.C. § 1412(a)(10)(C)(ii) requires a disabled child to have accepted a public school placement—even an admittedly inappropriate one—as a prerequisite to reimbursement for private school tuition. As petitioner agrees, Pet. 17, in *M.M. ex rel. C.M. v. School Board of Miami-Dade County,* 437 F.3d 1085 (11th Cir. 2006), the Eleventh Circuit, like the Second Circuit, rejected that restrictive reading, holding that parents who placed their disabled child in private school were eligible for reimbursement for tuition and related services if the school board had denied the child a FAPE—even if the child had never been enrolled in public school. While pointing out that the hearing-impaired child in that case had received auditory-verbal therapy under the authority of a public agency through the age of three, the Eleventh Circuit went on to explain that sole reliance on the fact that the child never attended public school was legally insufficient to deny reimbursement. *Id.* at 1098. The court of appeals emphasized this Court's reasoning in *Burlington* that it would be an "empty victory" to tell parents years after they correctly challenged an inappropriate public placement that their private school expenses could not be reimbursed by school officials and that, if that were the case, "the child's right to a *free* appropriate public education, the parents' right to participate fully in developing a proper IEP, and all of the procedural safeguards would be less than complete." *Id.* at 1099 (quoting *Burlington,* 471 U.S. at 370).

The Eleventh Circuit likewise cited this Court's admonition in *Carter* that the IDEA should not be read to defeat the statute's objective of ensuring that children with disabilities "receive an education that is both appropriate and free." *Id.* (quoting *Carter*, 510 U.S. at 13). Listing several district court decisions that had concluded that, even when a child has never enrolled in public school, reimbursement is proper if the school board fails to offer a sufficient IEP and a free appropriate public education, the court agreed that "forcing parents into accepting inadequate IEPs in order to preserve their right to reimbursement runs contrary to the rights recognized in the *Burlington* line of cases." *Id.*

Without any analysis or discussion, the petitioner cites the First Circuit's decision in *Greenland School District v. Amy N.*, 358 F.3d 150 (1st Cir. 2004), as evidence of a circuit split. *See* Pet. 4, 10, 16. The Second Circuit discussed *Greenland* at length, and while it disagreed with a few statements made by the First Circuit in *Greenland*, it correctly treated *Greenland* as factually distinguishable and even agreed with the First Circuit's disposition of the case. Pet. App. 49a-54a.

Greenland held only that parents who had unilaterally removed their disabled child, Katie, from public school and placed her in private school, without notice to the school district and without offering school authorities an opportunity to prepare an IEP, were not eligible for tuition reimbursement. *Greenland*, 358 F.3d at 152-54, 160-62. Emphasizing the notice requirements specified in 20 U.S.C. § 1412(a)(10)(C)(iii), governing unilateral parental removal of a child from public school, the First Circuit explained that "[t]hese statutory provisions make clear Congress's intent that *before* parents place their child in private school, they must at least give notice to the school that special education is at issue. This serves the important purpose of giving the school system an opportunity, before the child is removed, to assemble a team, evaluate the child, devise an appropriate plan, and

determine whether a free appropriate public education can be provided in the public schools." *Greenland,* 358 F.3d at 160 (emphasis in original). "The purpose of the notice requirement," the First Circuit continued, "is to give public school districts the opportunity to provide FAPE before a child leaves public school and enrolls in private school." *Id.* at 161.

To be sure, the First Circuit stated that "tuition reimbursement is only available for children who have previously received 'special education and related services' while in the public school system (or perhaps those who at least timely requested such services while the child is in public school)," *id.* at 159-60, but it said so in the course of discussing the significance of the parents' complete failure to provide notice to the school district that their child was in need of special education and required an evaluation before withdrawing her from public school. As the First Circuit emphasized, "neither Katie's parents nor anyone else requested an evaluation for Katie while she was at Greenland." *Id.* at 160. She was removed from Greenland "for reasons having nothing to do with any issue about whether Katie was receiving FAPE." *Id.* "The point," the court stressed, "is that there was no notice at all to the school system before Katie's removal from Greenland that there was any issue about whether Katie was in need of special education." *Id.*

None of the discussion in *Greenland* has any bearing on the factual situation or question presented here. As the Second Circuit recognized, Anthony's parents gave the school district ample notice that he was in need of special education, after which the school district classified Anthony as disabled. Pet. App. 54a. And again, when the school district offered Anthony an IEP his parents believed inappropriate, his parents provided timely notice of their dissatisfaction to the school district. *Id.* Moreover, his parents' decision to keep Anthony in private school and not to accept the proffered inadequate public school placement had *everything* to do with the fact that the school

district had denied Anthony a free appropriate public education—which, again, petitioner concedes. Here, in contrast to the situation in *Greenland,* FAPE was very much "at issue." *Greenland,* 358 F.3d at 161 (quoting the heading of 34 C.F.R. § 300.403 (2006)).

The First Circuit simply did not address the issue whether 20 U.S.C. § 1412(a)(10)(C)(ii) bars a court from exercising its broad equitable discretion to award tuition reimbursement where parents provided the school district ample notice of their dissatisfaction, when the IEP recommending a public school placement was conceded by school officials to be inappropriate, where the parents' private school placement was proper under the statute, and where the child had never even been removed from public school because he had been enrolled in private school all along. As the First Circuit has since recognized, the 1997 amendments clarify the circumstances under which "[p]arents who unilaterally remove their child from public school" are entitled to private school tuition reimbursement. *Ms. M. ex rel. K.M. v. Portland Sch. Comm.,* 360 F.3d 267, 268, 271 (1st Cir. 2004). That situation did not arise here.

Indeed, the Second Circuit explained that it agreed with the First Circuit's resolution of *Greenland.* Pet. App. 52a. As the Second Circuit noted, not only do 20 U.S.C. § 1412(a)(10)(C)(iii)(I) & (III), added in the 1997 amendments, make clear that reimbursement may be reduced or denied if the parents fail to meet specific notice requirements before removing their child from public school or upon a judicial finding that the parents' conduct was unreasonable, Pet. App. 52a-53a, but even before the amendments were effective, the Second Circuit had held that it was inequitable to order reimbursement under circumstances such as those in *Greenland. Id.* at 53a. Citing its decision in *M.C. ex rel. Mrs. C. v. Voluntown Board of Education,* 226 F.3d 60 (2d Cir. 2000), the Second Circuit observed that "[c]ourts have held uniformly that reimbursement is barred where parents

unilaterally arrange for private educational services without ever notifying the school board of their dissatisfaction with their child's IEP." *Id.* (quoting *M.C.*, 226 F.3d at 68)[1]; *see, e.g., Berger v. Medina City Sch. Dist.*, 348 F.3d 513, 523-24 (6th Cir. 2003); *Schoenfeld v. Parkway Sch. Dist.*, 138 F.3d 379, 381-82 (8th Cir. 1998).

Although there are a few district court decisions that are in conflict (mainly within the District of Maryland), *compare* Pet. 17 (citing *Lunn v. Weast*, 2006 WL 1554895 (D. Md. May 31, 2006); *Baltimore City Bd. of Sch. Comm'rs v. Taylorch*, 395 F. Supp. 2d 246 (D. Md. 2005); *T.H. ex rel. A.H. v. Clinton Twp. Bd. of Educ.*, 2006 WL 1128713 (D. N.J. Apr. 25, 2006)), *with Justin G. ex rel. Gene R. v. Bd. of Educ.*, 148 F. Supp. 2d 576 (D. Md. 2001), and *E.W. ex rel. J.W. v. Sch. Bd. of Miami-Dade County*, 307 F. Supp. 2d 1363 (S.D. Fla. 2004), this Court generally does not grant certiorari to resolve conflicts among or within district courts. *See* Supreme Ct. R. 10. A few more decisions from the courts of appeals may well clear up any disagreement that persists at the district court level. It is premature for this Court to conclude that a conflict exists that merits its attention.

II. It is a mark of just how undeveloped the case law is that no court, as best respondents' counsel can discern, has taken note of the United States Department of Education's interpretation of the disputed provision during the exercise of

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[1] In *M.C.*, the Second Circuit denied reimbursement to parents for psychological services for their child where they had provided no notice to the school district regarding the need for such services or their dissatisfaction with their child's IEP until long after the services had ended. The court of appeals noted that the 1997 amendments, which did not apply because the events pre-dated the amendments, codified that result. *M.C.*, 226 F.3d at 68-69 & n.9.

its rulemaking authority.[2] In preambles to the final rules issued by the Department of Education in 1999 (implementing the 1997 statutory amendments) and then again in 2006 (implementing the 2004 statutory amendments), the agency expressly rejected the construction petitioner advances here. Instead, the Department of Education interpreted the IDEA as continuing to confer authority on a court to order tuition reimbursement for parents' unilateral private placement of their disabled child when the school district has denied the child a free appropriate public education—even if the child did *not* first receive special education and related services from the school district. *See* 71 Fed. Reg. 46540, 46599 (Aug. 14, 2006); 64 Fed. Reg. 12406, 12602 (Mar. 12, 1999).

In the 1999 final rule preamble, the Department of Education, discussing 34 C.F.R. § 300.403, which largely tracked the statutory language of 20 U.S.C. § 1412(a)(10)(C), agreed with a commenter who requested that the agency clarify that the provisions of § 300.403(c), (d), & (e) (implementing 20 U.S.C. § 1412(a)(10)(C)(ii) & (iii)) apply only in situations in which the child previously has received special education and related services under the authority of a public agency. In other situations, hearing officers and courts retained broad equitable powers to award relief, applying the reimbursement standard announced in *Burlington*. The agency explained:

> As a commenter noted, hearing officers and courts retain their authority, recognized in *Burlington* and *Florence County School District Four v. Carter*, 510

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[2] The Second Circuit cited an interpretive letter from the Department of Education, however, expressing the view that the question presented in the query—whether actual receipt of special education and related services from a public school district is a prerequisite to a parent's ability to seek tuition reimbursement for a unilateral private school placement—was not answered or foreclosed by IDEA § 612(a)(10)(C). Pet. App. 43a-44a.

> U.S. 7 (1993) (*Carter*) to award "appropriate" relief if a public agency has failed to provide FAPE, including reimbursement and compensatory services, under section 615(i)(2)(B)(iii) [now § 615(i)(2)(C)(iii)] in instances in which the child has not yet received special education and related services. *This authority is independent of their authority under section 612(a)(10)(C)(ii) to award reimbursement for private placements of children who previously were receiving special education and related services from a public agency.*

64 Fed. Reg. at 12602 (emphasis added).[3]

The Department of Education recently repeated and expanded on this interpretive point in the preamble of its final rule issued in August 2006. There, in connection with proposed 34 C.F.R. § 300.148 (the renumbered version of the former 34 C.F.R. § 300.403), a commenter asked the agency to revise the regulations along the lines argued by petitioner here, to make it "clear that a unilateral placement in a private school

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[3] Without the benefit of briefing from respondents, the Second Circuit speculated that the contested "previously" phrase in 20 U.S.C. § 1412(a)(10)(C)(ii) may have suggested a reference to the IDEA's previous requirements. Pet. App. 46a-47a. A better reading, we submit, would be to read § 1412(a)(10)(C)(i) as providing a safe harbor protecting school authorities from reimbursement awards only if they make a FAPE available to the child, and to read clauses (ii) and (iii) as clarifying the circumstances in which parents of a child "who previously received special education and related services under the authority of a public agency" may obtain tuition reimbursement. Clause (ii), as the Department of Education agrees, does not address whether reimbursement is available to parents whose disabled children never received such services. This reading does not treat the contested phrase as superfluous, *see* Pet. 18, but rather, recognizes that the phrase describes the subset of children to which the requirements of (iii) pertain.

without first receiving special education and related services from the LEA [local educational agency] does not require the public agency to provide reimbursement for private school tuition." 71 Fed. Reg. at 46599. Reaffirming the continued applicability of the *Burlington-Carter* test for reimbursement to parents who unilaterally place their children in private school, the Department of Education refused "to include a provision relieving a public agency of its obligation to provide tuition reimbursement for a unilateral placement in a private school if the child did not first receive special education and related services from the LEA." *Id.* The agency reiterated that the authority under the IDEA to reimburse in this instance is "independent" of the court's or hearing officer's authority under IDEA § 612(a)(10)(C)(ii) to reimburse for private placements of children who previously were receiving special education and related services from a public agency. 71 Fed. Reg. at 46599. The Department admonished that school authorities can avoid reimbursement awards "by offering and providing FAPE consistent with the Act either in public schools or in private schools in which the parent places the child." *Id.*

As Congress has conferred IDEA rulemaking authority on the Department of Education, *see* 20 U.S.C. § 1406, the agency's interpretation of the statute in the course of conducting a notice-and-comment rulemaking is entitled to *Chevron* deference. *United States v. Mead Corp.*, 533 U.S. 218, 229-30 (2001).

III. Petitioner contends that the court of appeals' decision here is inconsistent with a statement this Court made in *Burlington* and conflicts with the Court's recent decisions in *Schaffer v. Weast*, 546 U.S. 49, 126 S. Ct. 528 (2005), and *Arlington Cent. Sch. Dist. Bd. of Educ. v. Murphy*, 126 S. Ct. 2455 (2006). Pet. 4-5, 6, 10-12, 14-15, 17-18. The Second Circuit's decision follows, not ignores, *Burlington*, and neither *Schaffer* nor *Arlington* has any bearing on the question presented.

The petitioner argues that the Second Circuit's holding is inconsistent with *Burlington*'s recognition that "parents who unilaterally change their child's placement during the pendency of review proceedings, without the consent of state or local school officials, do so at their own financial risk." Pet. 15 (quoting *Burlington*, 471 U.S. at 373-74). That statement is plainly true and remains so under the Second Circuit's decision. The risk arises because, as this Court pointed out in *Carter*, parents are "entitled to reimbursement *only* if a federal court concludes both that the public placement violated IDEA and that the private school placement was proper under the Act." *Carter*, 510 U.S. at 15 (emphasis in original). If parents contest an IEP recommending a public school placement and unilaterally place their child in private school while administrative proceedings are underway, they do not know at that time whether their conviction that the IEP is inappropriate and that their own private school placement is proper will ultimately be vindicated during the administrative hearing process or in court. Here, of course, as this case reaches this Court, it is undisputed that Anthony's IEP was inadequate and that his private school placement was appropriate.

Similarly, the court of appeals' decision does not conflict with *Schaffer*, in which this Court held that the burden of proof at an impartial due process hearing on the appropriateness of an IEP lies with the party seeking relief. 126 S. Ct. at 531. Petitioner refers to language in *Schaffer* criticizing the parents there for asking the Court "to assume that every IEP is invalid until the school district demonstrates that it is not." Pet. 5 (quoting *Schaffer*, 126 S. Ct. at 536). Such language has nothing at all to do with this case, in which the school district *conceded* before the IHO that its proposed public placement of Anthony was inappropriate. Petitioner also emphasizes the Court's observation that Congress has amended the IDEA several times, including in 1997, "to reduce its administrative and litigation-related costs. For example, in 1997 Congress

mandated that States offer mediation for IDEA disputes." Pet. 6 (quoting *Schaffer*, 126 S. Ct. at 535). Again, that observation has nothing to do with the question presented here. The opportunity to mediate is not analogous to the opportunity to obtain reimbursement for private school tuition. The cost of an education is not a litigation or administrative cost.

The Court's decision in *Arlington* is equally inapposite. There, the Court ruled that the IDEA's fee-shifting provision, which allows a court to award reasonable attorneys' fees as part of the costs to parents who prevail in an action brought under the Act, does not authorize parents to recover fees for services rendered by experts in such actions. 126 S. Ct. at 2457. Petitioner cites *Arlington*'s instruction that, as Spending Clause legislation, the IDEA must be construed from the perspective of a state official deciding whether the state should accept IDEA funds. Pet. 17 (citing *Arlington*, 126 S. Ct. at 2459). That admonition is irrelevant here, where the Second Circuit's interpretation of the statute—that courts have power to order state officials to reimburse parents for private school tuition where the school district denied their child a FAPE—maintains the interpretation of courts' equitable powers under 20 U.S.C. 1415(i)(2)(C)(iii) that has governed for more than 20 years, an interpretation also long endorsed by the federal agency with rulemaking authority on the subject. Petitioner has pointed to nothing in the 1997 amendments or their legislative history that demonstrates that Congress intended to overturn *Burlington*'s long settled construction of courts' broad discretionary powers under the Act. *See Edelman v. Lynchburg Coll.*, 535 U.S. 106, 116-17 & n.13 (2002) (Congress is presumed to know the background law when it acts and to expect that its enactments will be interpreted in conformity with Supreme Court precedents); *see also* Pet. App. 35a.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

MARK I. REISMAN
Counsel of Record
MARK I. REISMAN, P.C.
The Hill Building
30 State Street - Suite 102
Ossining, New York 10562
(914) 944-4087

JOYCE B. BERKOWITZ
6605 Pittsford-Palmyra Road
Suite E-10
Fairport, New York 14450
(585) 421-9094

BONNIE I. ROBIN-VERGEER
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, N.W.
Washington, D.C. 20009
(202) 588-1000

Counsel for Respondents

December 2006

(4)

No. 06-580

In The

Supreme Court of the United States

OCTOBER TERM 2006

—♦—

BOARD OF EDUCATION OF THE HYDE PARK CENTRAL SCHOOL DISTRICT,

Petitioner,

-against-

FRANK G. and DIANNE G. Parents of a Disabled Student, ANTHONY G.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

JAMES P. DROHAN
DONOGHUE, THOMAS, AUSLANDER & DROHAN, LLP
Attorneys for Petitioner
2517 Route 52
Hopewell Junction, New York 12533
(845) 227-3000

—♦—

SW

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PRELIMINARY STATEMENT

This brief is submitted, pursuant to Rule 15, in reply to those new points raised by Respondents in their Brief in Opposition to the Petition for Certiorari.

ARGUMENT

POINT I

THE UNITED STATES DEPARTMENT OF EDUCATION'S INTERPRETATION FO THE STATUTE AT ISSUE IS NOT ENTITLED TO CHEVRON DEFERENCE.

Respondents refer this Court to authority never relied upon by the Second Circuit itself in reaching its conclusion regarding the disputed statutory language – i.e., the United States Department of Education's preambles to the final rules issued in implementation of the IDEA Amendments in 1999 and 2006. Brief in Opposition to Certiorari, pp. 18-20.

As Respondents concede, however, no court has relied upon (or apparently even discussed) the USDOE's language contained in those preambles, even though a number of federal district courts and circuit courts have now weighed in on the issue. Id., p. 17.

(i) ***Chevron Deference Would be Inappropriate, since the Statute is Clear on Its Face.***

We respectfully submit that Chevron deference is, in any event, not warranted in this circumstance. It is settled law that, "...if the intent of Congress is clear," a court reviewing an agency's construction of a statute that its administers,

"...must give effect to the unambiguously expressed intent of Congress." Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43 (1984).

Where, as here, no ambiguity exists in the statute's language, deference to the USDOE's interpretation would be inappropriate.

(ii) ***If, as Respondents Appear to Concede, the Statute is Ambiguous, Such Ambiguity Defeats Any Claim That Congress Unambiguously Conditioned Receipt of Federal Monies in the Manner Asserted.***

In the Petition for Certiorari, we have argued that the Second Circuit's decision below is inconsistent with this Court's recent ruling in Arlington v. Murphy, ___ U.S. ___, S. Ct. 2455 (2006). Specifically, this Court has held that statutory disputes under IDEA must be viewed under a Spending Clause analysis, under which the proponent of a particular statutory interpretation must be able to demonstrate that Congress has unambiguously conditioned the receipt of federal monies in the manner asserted. Petition for Certiorari, at pp. 17-18.

In suggesting that the USDOE's interpretation of the statute should be given deference, Respondents impliedly adopt what the Second Circuit conceded – that the statutory

provision at issue is ambiguous. See, Second Circuit's Opinion at pp. 46a and 52a of the Petition for Certiorari.

However, such statutory ambiguity will defeat a claim that Congress has clearly and unambiguously conditioned the States' receipt of federal monies in the manner asserted by the USDOE:

> ...When Congress attaches conditions to a state's acceptance of federal funds, the conditions must be set out unambiguously.

Arlington Central School District v. Murphy, 126 S. Ct. 2455, 2459 (2006); see also, Gregory v. Ashcroft, 501 U.S. 452, 464, and Pennhurst State School and Hospital v. Haldeman, 451 U.S. 1, 17 (1981).

As it is apparent that Congress has not spoken with nearly the degree of specificity required to condition States' receipt of IDEA funds in the manner suggested, the Chevron deference argument should be rejected, and certiorari should issue, as the Second Circuit's decision is in conflict with prior decisions of the Court.

POINT II

RESPONDENTS' ARGUMENT THAT THE DECISION AT ISSUE IS CONSISTENT WITH ARLINGTON V. MURPHY IGNORES THE SPENDING CLAUSE ANALYSIS.

Respondents argue that this Court's decision in Arlington v. Murphy is "irrelevant"[1] since:

> ...(P)etitioner has pointed to nothing in the 1997 amendments or their legislative history that demonstrates that Congress intended to overturn Burlington's long settled construction of courts' broad discretionary powers under the Act.

Brief in Opp., p. 22.

This argument, of course, turns the Spending Clause analysis on its head – the burden should have been upon respondents to show, in clear and unmistakable terms, that Congress intended the 1997 amendments to IDEA be construed to allow tuition reimbursement to parents who never enrolled their children in special education services provided by a public school system.

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[1] The Second Circuit's decision, issued after Arlington, nowhere cites to its decision, nor to the Spending Clause itself, in that Court's lengthy analysis of the statutory terms at issue.

POINT III

RESPONDENTS' PROPOSED READING OF THE STATUTE, IF FOLLOWED, WOULD ONLY POINT OUT THE AMBIGUITY OF THE LANGUAGE AT ISSUE.

In the Petition, it was pointed out that statute clearly limits tuition reimbursement to a situation where a student has, "...previously received special education and related services under the authority of a public agency" [Pet., p. "2"], but that the Second Circuit found that "previously," in this context, referred to the status of the law prior to the 1997 Amendments. Id., at pp. 10-11.

Respondents' Brief, however, makes no attempt to explain or justify this unsupportable conclusion by the Second Circuit – instead, it proffers its own explanation of the statutory language, which is entirely different than that provided by the Second Circuit:

> ...(A) better reading, we submit, would be to read §1412(a)(10)(c)(i) as providing a safe harbor protecting school authorities from reimbursement awards only if they make a FAPE available to the child, and to read clauses (ii) and (iii) as clarifying the circumstances in which parents of a child "who previously receives special education and related services under the authority of a

> public agency" may obtain tuition reimbursement under Clause (ii), as the Department of Education does not address whether reimbursement is available to parents whose children never received such services. This reading does not treat the contested phrase as superfluous (see, Pet. 18), but rather recognizes that the phrase describes the subset of children to which the requirements of (iii) pertain.

Id., p. 19, fin. "2."

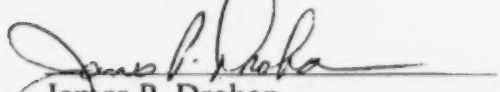
As can be seen by this footnote, Respondents' interpretation of the statute is completely different from that espoused by the Second Circuit. When viewed against the Second Circuit's own ruling, Respondents' reading simply demonstrates ambiguity in the statute at issue, and such ambiguity means the USDOE's interpretation of the statute would not pass muster under the Spending Clause analysis set forth in Point II, supra.

CONCLUSION

IT IS RESPECTFULLY REQUESTED THAT THE PETITION FOR CERTIORARI BE GRANTED.

Dated: Hopewell Junction, NY
January 2, 2007

Respectfully submitted,
DONOGHUE, THOMAS, AUSLANDER & DROHAN, LLP

By: 

James P. Drohan
A Member of the Firm
2517 Route 52
Hopewell Junction, NY 12533
Tel.: (845) 227-3000
FAX: (845) 227-6873

Of Counsel:
Daniel Petigrow